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SUPREME COURT U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-5695

PERCY LEO DOBARD,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

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QUESTIONS PRESENTED

1. Whether the Alabama courts have violated the requirements of the Eighth Amendment in sentencing the Petitioner to death without considering all of the criteria for proportionality review required by Solem v. Helm, ___ U.S. ___, 103 S.Ct. 3001 (1983).

2. a. Whether this Court's mandate in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968) was violated by removal for cause of a juror who equivocally responded concerning her ability to assess a death penalty.

b. Whether this Court should promulgate uniform standards for Witherspoon voir dire to stem the tide of Witherspoon litigation.

3. Whether the Petitioner's Fourteenth Amendment due process rights were violated by the trial court's refusal to ascertain whether the sequestered petit jury was improperly influenced by viewing accounts of, and commentary about, the attempted assassination of President Ronald Reagan.

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NO. A-___

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OPINIONS BELOW

The opinion of the Alabama Supreme Court, Ex parte Dobard, is reported at 435 So.2d 1351 (Ala. 1983), and is set forth in Appendix A. The opinion of the Alabama Court of Criminal Appeals is reported at 435 So.2d 1383 (Ala. Cr. App. 1982) and is set forth in Appendix B.

JURISDICTION

The judgment of the Alabama Supreme Court was entered on July 8, 1983 and rehearing was denied on August 5, 1983. Justice Powell extended the time within which to file this petition for a writ of certiorari to and including November 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner challenges the affirmance of his sentence of death as violative of several provisions of the United States Constitution, to-wit the Eighth and Fourteenth Amendments. These provisions are set out, in pertinent part, in Appendix C. Section 13A-5-53, Code of Alabama is set out in Appendix D for the convenience of the Court.

STATEMENT OF THE CASE

On March 30, 1981, the trial of Percy Leo Dobard, charged with first-degree murder, began in the Circuit Court of Marengo County, Alabama. The jury was sequestered. On that same day John Hinckley, Jr. attempted to assassinate the President of the United States, Ronald Reagan. Despite the sequestration order, the jury was permitted to watch television accounts of the attempted assassination, along with the attendant editorialization. The trial court at the behest of the defense counsel ascertained that fact but did not determine the nature of what was seen or heard. Neither did it ascertain whether any jurors were prejudiced by the media coverage. (R. 774). On March 31, 1981, the jury found petitioner guilty of murder. On April 1st the same jury fixed his punishment at death. The trial judge affirmed the death penalty and sentenced Dobard to die by electrocution in Alabama's electric chair.

The facts leading up to Dobard's arrest and conviction are as follows: On June 21, 1980, at approximately 5:30 a.m., O'Jim's Restaurant near Eutaw, Alabama, was robbed by a young black couple from New Orleans, Jeanette Kennedy and Percy Leo Dobard. Shortly thereafter, Wayne Sudduth, a Livingston University security guard, notified police headquarters that he had stopped an automobile similar in appearance to the vehicle described in the radio report of the O'Jim's robbery. Sudduth, apparently not fearful, approached the car and asked to see Dobard's driver's license. He never unholstered his gun. When Sudduth subsequently failed to respond to a radio call, Officer Raymond Byrne of the Livingston police force went to Sudduth's last reported location to investigate. There, Byrne found Sudduth lying dead in the road. Sudduth had suffered two direct

gunshot wounds. The automobile reportedly stopped by Sudduth later was found some miles away, where it had left the road and went into a field.

Dobard and Kennedy were arrested by police after a pickup truck driven by Dobard went out of control at a police roadblock, and flipped over.[1] Several witnesses testified they saw Dobard, with his left arm pinned under the truck, toss away a pistol. A policeman testified, though, that as another pickup went through the roadblock ahead of Dobard and Kennedy, the occupants yelled to inform him that "the girl had a gun" (R. 404). Both Dobard and Kennedy were arrested without incident and charged with the murder of Wayne Sudduth.

The only witness to testify at trial that Dobard shot Sudduth was Jeanette Kennedy. Kennedy's testimony sealed a plea agreement in which she received 20 years in prison for first degree murder provided she testified against Dobard in accordance

[1]Dobard and Kennedy stole the pickup truck after their car was driven off the road and become mired in the field.

with a previously given statement. The bargain was not final until she so testified.[2]

Kennedy's testimony was neither consistent nor coherent. The gist of her story was that after Sudduth approached the car and asked Dobard for a driver's license, Dobard reached around, ostensibly for his wallet, and came up with the pistol, which he

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[2]The following excerpt from the pre-trial motions hearing elaborates upon the plea agreement:

> MR. REID: All right; the next motion is a motion to disclose impeachment information. The motion would apply to any witnesses the State intends to use, but in particular, we are asking the State to furnish this information about Jeanette Kennedy.
>
> THE COUPT: I'll tell you what I heard the State say: I heard the State say that if she testified truthfully at any trial of Percy L. Dobard, they would recommend that the sentence be twenty years in the penitentiary; is that correct?
>
> MR. WATKINS: That's correct.
>
> THE COURT: The condition upon her truthful testimony as given in a statement to them that is reduced to writing; if she testifies at the trial substantially to the truth and it is substantial to that statement.
>
> MR. REID: All right; has she been sentenced yet?
>
> THE COURT: She has not been sentenced anywhere.
>
> MR. REID: She has not been sentenced in any case.
>
> THE COURT: Sentencing is a condition upon her testifying truthfully in the case as per a written transcribed statement that she has made (R. 196-97).

fired three times at Sudduth.[3] At one point Kennedy testified Dobard got out of the car; at another she stated he simply opened the door and put a foot outside. This seemingly minor point takes on great significance because bullet trajectories are the best evidence of who actually shot Sudduth. See the description of the crime scene, infra.

The defense's theory of the case was that Kennedy was the triggerperson. This theory was consistent on its face with the confusing physical evidence of the crime scene. Indeed, the angles of the first two bullets as they entered Sudduth's body and the position of the third bullet that entered the door post make it more likely than not that Kennedy killed Sudduth. It was also consistent with the testimony of the owner of the stolen pickup truck, see n. 1 supra, that Kennedy screamed repeatedly to Dobard to "kill him, kill him" [the pickup owner]. Because reconstruction of the crime scene was so difficult, and so crucial, defense counsel sought funds from the court so that his indigent client could employ an expert. The court entered an order allowing him to spend up to $1,000 of the $1,000 maximum attorney fee for representing an indigent defendant. In short, the court awarded nothing for experts.[4] The State called no less than four (4) state-paid experts, including a coroner, a forensic pathologist and a firearms expert, to bolster their case against Dobard. One of those experts described his employer as "the scientific arm of the police community" (R. 549).

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[3]Two shells in fact struck Sudduth. One was fired through the door post, and later was found embedded in the rear firewall of the car. Apparently schrapnel from that bullet grazed Sudduth's leg.

[4]To suggest that appointed defense counsel David Reid should have used this token fee for experts would be callous and absurd. Reid undoubtedly lost thousands of dollars in addition to angering clients in his defense of Dobard.

Prior to trial the jury was voir dired concerning death scruples. Two jurors were excused by the court for cause. Defense counsel objected to the dismissal of both jurors, on the grounds that neither met the standards imposed by Witherspoon v. Illinois, 391 U.S. 510 (1968), and that to remove jurors opposed to the death penalty deprived the defendant of a fair trial by a jury composed of a representative cross-section of the community (R. 313).

The jury convicted Dobard, and a sentencing hearing was held at which the following facts were adduced:

Dobard, a poor black from New Orleans' ghetto, was quarterback of his high school football team, and a leading student. As a youth he showed much promise. He then was drafted and served with the United States Army in West Germany. His army medical records indicate that at some point after he went abroad Dobard became addicted to heroin and cocaine. Despite his addiction to drugs, Dobard had no significant history of criminal activity. Although Dobard attempted to rid himself of the addiction several times upon his return, he generally was unsuccessful. Jeanette Kennedy, an eighteen year old drug addict, had one child by Percy Dobard and was pregnant with another at the time of Officer Sudduth's death. She also apparently was a leading supporter of Dobard's continuing drug use, several times removing him from drug rehabilitation programs. Shortly after Kennedy checked Dobard out of a drug rehabilitation program for the last time, they began their tragic journey to Alabama.

The jury sentenced Dobard to death. At the mandatory mitigation hearing the trial judge affirmed the sentence, finding that two aggravating circumstances[5] outweighed the one mitigating circumstance: Dobard had no history of prior criminal activity.

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[5]Two statutory aggravating circumstances were found by the court: (1) Dobard was engaged in flight after committing a robbery, and (2) a capital felony was committed for the purpose of avoiding or preventing a lawful arrest (R. 813).

Dobard's motion for a new trial was perfunctorily denied, and his conviction was affirmed by the Alabama Court of Criminal Appeals. Dobard v. State, 435 So.2d 1338 (1982). Following an adverse judgement, without argument, by the Alabama Supreme Court, Ex parte Dobard, 435 So.2d 1351 (Ala. 1983) and denial of rehearing, the Dobard execution was set for September 23, 1983.

Dobard's sentence was subject to appellate proportionality review. In purporting to give the proportionality review under the Eighth Amendment, Alabama law, and in the face of a challenge by the petitioner, neither appellate court considered sentences given in other states for similar crimes by similar people. Dobard v. State, supra, 435 So.2d 1345; Ex Parte Dobard, supra, 435 So.2d at 1358.

On September 16, 1983 Justice Powell granted Dobard's motion for a stay of execution, pending filing of this petition for a writ of certiorari. Further facts are supplied where necessary to development of the argument.

REASONS FOR GRANTING THE WRIT

A. Introduction

This is a death sentence case. The death sentence of Percy Leo Dobard was imposed under facts which indicate a strong likelihood that he was not the "triggerman" in the killing of officer Sudduth and that he may not have "deliberately" murdered or participated in the murder of anyone. Numerous factors noted in the Statement of the Case generate grave concern about the overall fairness of the trial and sentencing of Dobard. Because of the death penalty imposed under those circumstances and because of the reasons stated below, there are "special and important reasons" to grant the writ under Rule 19, Supreme Court Rules.

1. The Eighth Amendment proportionality analysis of the state courts in this case did not comply with this Court's applicable decision in Solem v. Helm, ___ U.S. ___, 103 S.Ct. 3001 (1983), by not considering punishments provided in other states of this country for similar crimes committed by similar people. Infra, pp. 8-11.

2. The excusal for cause of a juror was not in accord with Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968). The analysis used in allowing the excusal for cause was in conflict with the decisions of federal courts of appeals, including those of the Eleventh Circuit Court of Appeals. Moreover, this Court needs to end constant Witherspoon litigation around the country by reasserting the mandate of Witherspoon and requiring a uniform and clear standard for Witherspoon voir dire. Infra, pp. 11-19.

3. The state appellate decisions in this case are in conflict with the prior decisions of this Court and the federal courts of appeals in their analysis of whether the trial court erred under the due process clause of the Fourteenth Amendment when it did not ascertain what the sequestered jurors saw on

television concerning the attempted assassination of President Reagan and whether any juror was affected by what was seen. Infra, pp. 19-26.

B. Argument

I. The Petitioner Was Sentenced To Death In Violation Of The Eighth Amendment Because Of The Failure Of The Alabama Courts To Consider Required Objective Standards In Their Proportionality Review Of His Sentence.

In Solem v. Helm, ___ U.S. ___, 103 S.Ct. 3001 (1983), this Court for the first time explicitly established three objective criteria which must be utilized in "a court's proportionality analysis under the Eighth Amendment." In this case the third Solem criterion, to-wit, "the sentences imposed for commission of the same crime in other jurisdictions," was not considered by either the trial court, the Alabama Court of Criminal Appeals or the Supreme Court of Alabama, in proportionality reviews of Percy Leo Dobard's death sentence (R. 174, 176); Dobard v. State, supra, 435 So.2d at 1345; Ex Parte Dobard, supra, 435 So.2d at 1358. Consequently, the case must be reversed and remanded for a constitutionally sound proportionality review.

Although the Court in Solem was reviewing a sentence of imprisonment for a term of years, it is clear that the Eighth Amendment proportionality principle applies more stringently--not less--in death sentence cases. Solem, supra, 103 S.Ct. 3007; id. at 3017, 3018 (Burger, C.J., with White, Rehnquist, and O'Connor, J.J., dissenting). See also, Enmund v. Florida, 458 U.S. ____, 102 S.Ct. 3368, 3386 n. 27 (1982)(O'Connor, J. with Burger, C.J., Powell, and Rehnquist, J.J., dissenting). (Court has conducted less searching inquiry for punishments less than death.) Solem itself was anchored in the holdings of previous death penalty cases that recognized that the Eighth Amendment is a national standard and that the "contemporary values" of the country must be assessed in

determining whether the death penalty is disproportionate in a particular case. Such a determination is based upon an individualized assessment of "the character of the individual and the circumstances of the crime" in that case. Solem, supra, 103 S.Ct. at 3010 n. 17; Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 2744 (1983); Enmund, supra; Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861 (1977). Indeed, as the dissenting opinion in Solem indicates, all Justices agree that the principle must be applied in capital punishment cases. Solem, supra, 103 S.Ct. at 3021. See also, Enmund v. Florida, supra, 102 S.Ct. at 3385 (O'Connor, J., with Burger, C.J., Powell, and Rehnquist, J.J., dissenting).

In Enmund v. Florida, supra, for example, the Court found that a death sentence was disaproportionate to the crime committed by the defendant even though he was convicted of murder under Florida law.[6] In giving individualized consideration to the facts concerning Enmund and his offense, the Court relied heavily on its prior opinion in Coker v. Georgia, supra, which reviewed objective factors, including not only what other state legislatures had prescribed for similar conduct, but also, what "American juries" across the country had actually done in such cases. Enmund, supra, 102 S.Ct. at 3372-74; id. at 3386 (O'Connor, J., with Burger, C.J., Powell and Rehnquist, J.J. dissenting). Thus, Solem only applied to a non-capital punishment case proportionality analysis principles that had been established in prior capital cases.

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[6] In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976), this Court upheld the Florida death statute on its face as to cases of deliberate murder by a defendant. Proffitt was decided the same day as Gregg v. Georgia, 428 U.S. 1301, 96 S.Ct. 2909, 2932 (1976), which held that the imposition of capital punishment for the crime of murder when a life was taken deliberately by the offender is not invariably disproportionate to the crime. (Emphasis added). Of course, "no penalty is per se constitutional." Solem, supra, 103 S.Ct. 3009, 3010.

In 1981, recognizing the constitutional requirement of appellate proportionality analysis of death penalties, the Alabama legislature amended its statutes to require the Alabama Court of Criminal Appeals, subject to the review by the Alabama Supreme Court, to determine:

> Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the Defendant.

§13A-5-53(B)(3), Code of Alabama (1975).

The petitioner in this case urges that the Alabama legislature correctly concluded that appellate proportionality analysis is constitutionally required, and must be based upon the individualized facts and circumstances of each case. See, Solem, supra, 103 S.Ct. at 3010; Stephens, supra, 103 S.Ct. at 2742, 2744. See also, Harris v. Pulley, 692 F.2d 1189, 1196 (9th Cir. 1982), cert. granted, 103 S.Ct. 1425 (1983).

Petitioner raised the issue of proportionality on appeal to both the Alabama Court of Criminal Appeals and the Supreme Court of Alabama. Each appellate court purported to conduct proportionality review. However, each merely referred to three reported Alabama cases in which a death penalty had been assessed against a defendant for murdering a police officer. Neither considered sentences provided for or given by legislatures and juries from other states in the country for similar crimes by similar defendants.[7] Dobard v. State, supra, 435 So.2d at 1345; Ex Parte Dobard, supra, 435 So.2d at 1358. Each court, therefore failed to address the third objective factor of Solem v. Helm:

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[7]Unlike the actions of the appellate courts in Georgia and Florida in conducting proportionality reviews, the Alabama courts have apparently never reversed a death sentence as being disproportionate. See, Gregg, supra, 96 S.Ct. at 2940; Proffitt, supra, 96 S.Ct. at 2969-2970.

that the sentence imposed upon Dobard not be disproportionate to sentences for the same crime imposed in other jurisdictions.

Accordingly, Petitoner requests this Court grant a writ of certiorari to address the issue of the Alabama Supreme Court's failure to conduct review consistent with the standards set out in Solem v. Helm, supra.

II. The Alabama Supreme Court Violated This Court's Witherspoon Mandate When It Permitted Dismissal Of Juror Cannon For Cause. This Court Could Avoid The Flood Of Witherspoon Claims By Promulgating A Uniform Witherspoon Inquiry.

Four times in the last fifteen years, this Court has reviewed dismissal for cause of death-scrupled jurors, and four times the message has been unmistakably clear:

> The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.

Witherspoon v. Illinois, 391 U.S. 510, 522 n.21, 88 S. Ct. 1770, 1777 n. 21 (1968) (emphasis in original). While the Court has not limited a state's right to seek dismissal for cause of a juror unwilling even to consider the death penalty, the standards set by this Court for dismissal are strict and unequivocal. The juror must make it:

> unmistakably clear (1) that they would automatically vote against imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Id. (emphasis in original). Accord Adams v. Texas, 448 U.S. 38, 44, 100 S.Ct. 2521, 2525-26 (1980) (invalidating Texas' death qualification provision in light of Witherspoon); Maxwell v. Bishop, 398 U.S. 262, 264-66, 90 S.Ct. 1578, 1580-81 (1970)

(remanded in light of Witherspoon); Boulder v. Holman, 394 U.S. 478, 481, 89 S.Ct. 1138, 1140 (1969) (same). See also, Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399 (1976) (Witherspoon mandates reversal even if "merely one" juror was dismissed improperly).

Yet, despite an unwavering mandate from this Court and Alabama's own stated commitment to follow that mandate, Liddell v. State, 287 Ala. 299, 251 So.2d 601 (1971), the Alabama Supreme Court in this case countenanced dismissal of a juror whose response to the Witherspoon inquiry was lacking entirely in "unmistakable" clarity. Further, the Alabama Supreme Court opinion in Dobard follows the pattern of many state and federal courts which, since Witherspoon, have engaged in torturous semantic hair-splitting litigation over Witherspoon compliance. These judicial semantic exercises occur in response to post hoc rationalizations of a failure to comply with standards neither difficult to comprehend nor impossible to follow. In light of the strict and clear requirements of Witherspoon, however, such hair-splitting is both inappropriate and unnecessary.

Accordingly, Petitioner's argument proceeds in two parts. First, the dismissal for cause of Juror Cannon failed to comply with the Witherspoon requirements. Second, petitioner respectfully suggests the time has come for this Court to establish a uniform Witherspoon inquiry, and thereby stem the tide of wasteful Witherspoon litigation.

a. The Alabama Supreme Court's Failure To Reverse On The Basis Of The Trial Court's Dismissal For Cause Of Juror Cannon Was Violative Of Petitioner's Due Process Rights, In Direct Contravention Of This Court's Witherspoon Mandate.

Juror Daisy Cannon was questioned as part of the first jury panel seated. The trial judge conducted the initial examination, in the course of which he asked, without response:

THE COURT: Now in this case, the State of Alabama is asking that the jury fix the punishment at death if the defendant is convicted. I want to ask you: Is there anyone on the jury panel that has a fixed opinion against capital punishment or imprisonment in the penitentiary? Does anyone have that fixed opinion against capital punishment?

(No Response)

THE COURT: I would like to know if you do and don't be embarrassed by saying that if you do or don't. I would like to know if anyone is opposed to capital punishment in any way, or has a fixed opinion in any way about capital punishment?

(No Response) (R. 255-56)

Despite the lack of response, indicating no juror had debilitating death scruples, the prosecutor pursued the matter, inquiring further, and eliciting response from Juror Cannon.

MR. WATKINS: . . . Ladies and Gentlemen, the judge has already qualified you on capital punishment, but I would like to go into it a little bit further to make sure that we understand each other. This case that we are going to try is one of the cases enumerated in the statute that says that a person may receive death if you find him guilty of a certain offense; and, I want to know if we all understand each other, that each of you are telling me individually that if you believe beyond a reasonable doubt and to a moral certainty, the necessary elements to return a verdict, which would mean that this person would be put to death by electrocution, that you would be able to do that? Is that what everybody is telling me? Is there anybody that would not be able to do that?

PJ: I don't believe I would.

THE COURT: All right; would you please stand up and give your name, please ma'am?

PJ CANNON: Daisy Cannon. And, I just don't believe I could send anyone to the electric chair.

MR. WATKINS: Mrs. Cannon, are you telling the Court that no matter what the evidence is; that if you believe beyond a reasonable doubt and to a moral certainty that this person did it; that if we follow the statute to show that we can prove all the necessary elements, that you would not be able to vote guilty if it meant that he would be sent to death?

PJ CANNON: I don't think I would.

THE COURT: All right; thank you for your candor Mrs. Cannon.

MR. WATKINS: We ask that she be excused for cause, Judge.

THE COURT: All right; I will take that up later. (R. 256-57) (emphasis supplied)

Although Juror Cannon's response indicates some personal hesitation about imposing the death penalty, her equivocating response fails to meet either prong of the Witherspoon test. See Witherspoon v. Illinois, 391 U.S. 510, 522 n.21, 88 S. Ct. 1770, 1777 n.21 (1968). Certainly, it does not make "unmistakably clear" that if instructed on the law of the state, after swearing to follow that law, Juror Cannon would be unable to follow her oath, and perform her sworn duty to consider the death penalty.

The Alabama Supreme Court sustained the validity of Juror Cannon's dismissal. That court found "it difficult to envision how [Juror Cannon] could have been more explicit in expressing an unqualified opposition to the death penalty." Ex parte Dobard, supra, 435 So.2d at 1356. With all due respect, petitioner has no such difficulty: had a simple "yes" or "no" been requested from Juror Cannon, petitioner would not be briefing this issue in this petition.[8] Had the response been "yes," dismissal of Juror

[8]Counsel for petitioner objected to the dismissal of Juror Cannon (R. 313), and the Alabama Supreme Court addressed the issue on the merits. Ex parte Dobard, supra, 435 So.2d at 1356.

Cannon would comply with Witherspoon; conversely, a "no" or another equivocal answer would indicate Juror Cannon was ineligible for exclusion.[9]

Given the uncertain nature of Juror Cannon's response, it was incumbent upon the trial court to pursue the line of questioning. This Court previously has indicated such an approach is required. See Witherspoon v. Illinois, supra, 391 U.S. at 522 n.21, 88 S. Ct. at 1777 n.21 (juror must make opposition "unmistakably clear"); Adams v. Texas, supra, 448 U.S. at 50, 100 S. Ct. at 2529 ("neither nervousness, emotional involvement nor inability to deny or confirm any effect whatsoever" valid grounds for excluding death-scrupled juror; "unmistakably clear" remains the standard). See also, Burns v. Estelle, 592 F.2d 1297, 1300 (5th Cir. 1979), adhered to 626 F.2d 396 (5th Cir. 1980) (en banc) (premature dismissal of juror; impossible to know what juror might have said under further questioning). This failure on the part of the trial court to inquire further and to obtain an "unmistakably clear" response clearly contravened the requirements of Witherspoon and its progeny.

Further, although petitioner asserts, infra, that the lower federal courts have not applied Witherspoon in a fashion consistent with this Court's opinions, the response given by Juror Cannon fails to pass muster under those decisions as well. See Witt v. Wainwright, 714 F.2d 1069, 1080-83 (11th Cir. 1983) ("I think it would" falls short of certainty required by Witherspoon); Hance v. Zant, 696 F.2d 940, 954-56 (11th Cir. 1983) (juror's response that, although in some cases death penalty might be warranted "I do not believe that I could vote

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[9]Of course the State could still remove Juror Cannon by use of a peremptory strike. But see Winick, Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 Mich. L. Rev. 1 (1982).

for it," unacceptable under Witherspoon); Granviel v. Estelle, 655 F.2d 673, 677 (5th Cir. 1981) ("No, I don't think I could" unacceptable under Witherspoon; follow-up question failed to clear uncertainty) (emphasis in original), cert. denied, 455 U.S. 1003, 102 S.Ct. 1636 (1982). But see Darden v. Wainwright, 699 F.2d 1031, 1037-40 (11th Cir. 1983) ("I believe I would" acceptable under Witherspoon) (emphasis supplied), mandate withheld pending reh. en banc, id. at 1043.[10]

The erroneous dismissal of even one juror under Witherspoon requires reversal of petitioner's conviction. Davis v. Georgia, 429 U.S. 122, 123, 97 S. Ct. 399, 400 (1976) (per curiam). Dismissal of Juror Cannon was erroneous under the opinions of this Court, as well as the opinions of the Federal circuit in which Alabama is located. Given that the Alabama Supreme Court's approach to the Witherspoon issue is in conflict with the holdings of this court and the federal appellate courts in the federal circuit of which Alabama is a part, certiorari is appropriate.

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[10]Judge Clark noted his dissent to the panel opinion in Darden, 699 F.2d at 1043.

b. The Erroneous Decision Of The Alabama Supreme Court In This Case Is Only One Decision In A Flood Of Witherspoon Litigation, Which This Court Could Avoid By Promulgating A Uniform Standard For Witherspoon Voir Dire.

Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770 (1968) continues to give rise to a plethora of cases assessing compliance with its mandate. The opinions in those cases are exercises in semantic hair-splitting, struggling to determine whether a juror has made "unmistakably clear" an inability to comply with his juror's oath. Compare McCorquodale v. Balkcom, 705 F.2d 1553, 1556-60 (11th Cir. 1983) (invalidating group voir dire and nonverbal response; reversing as error dismissal of juror who stated that she did not "think" she could vote for death penalty), mandate withheld pending reh. en banc, _____ F.2d _____ (1983); Hance v. Zant, supra, 696 F.2d at 955 (juror stated that although death penalty may be appropriate in some cases "I do not believe I could vote for it"; language held unacceptable under Witherspoon); Granviel v. Estelle, supra, 655 F.2d at 677 ("I don't think I could" unacceptable under Witherspoon; confusion not cleared up by subsequent questioning) with Martin v. Maggio, 711 F.2d 1273, 1285-86 (5th Cir. 1983) (though "crucial" question never answered, it would be exaltation of "form over substance" to reverse dismissal of juror for cause); McCorquodale v. Balkcom, supra, 705 F.2d at 1565 (Kravitch, J. dissenting) ("I don't think I could do it," qualified by "I really don't," sufficiently unambiguous to permit affirmance under Witherspoon); Darden v. Wainwright, supra, 699 F.2d at 1038 ("I believe I would" acceptable under Witherspoon).

The majority opinion for a divided panel of the Eleventh Circuit in Darden v. Wainwright, supra, 699 F.2d 1031, suggests both the reason for the difficulty and a solution:

> Neither Witherspoon nor Adams provides trial courts with the forumula or requisite colloquy for the proper excusal for jurors on Witherspoon grounds. Instead, the trial judge must decide whether each particular venireperson has made it "unmistakably clear" that he or she is within one of the two prongs of Witherspoon.

> The trial judge is in the best position to evaluate the prospective juror's demeanor and answers to the questions. For this reason, trial judges are generally accorded broad discretion in evaluating juror impartiality.

Id. at 1037, mandate withheld pending reh. en banc, id. at 1043. While in a broad sense the Darden majority is correct, the Witherspoon opinion admits of far less leeway than the Darden opinion would suggest. There are two grounds, and two grounds only, upon which a juror may be dismissed under Witherspoon; the answer to the inquiry must be definite and susceptible of only one interpretation.[11]

Petitioner respectfully suggests the time has come for this Court to propound specific Witherspoon questions, and again announce that there must be concrete answers. There is no good reason to refrain from such a pronouncement. In Witt v. Wainwright, supra, 714 F.2d at 1083, the State urged that the appellate court "avoid imposing the de facto requirement that prosecutors ask each prospective juror certain standard questions and receive talismanic answers before excusal for cause may be justified." Id. at 1083. The petitioner urges no resort to magic but fails to understand why a clear, common sense answer should not be obtained if available. Witherspoon, in fact, supports this approach. A properly framed and properly answered Witherspoon inquiry will leave no room for doubt as to whether the responding juror should be dismissed for cause.[12]

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[11] If the Witherspoon mandate were enforced, there would be no need for trial judges to play amateur psychologists and semanticists--particularly inappropriate when a defendant's life is at stake.

[12] Although prosecutors may have an aversion to so-called "talismanic" "yes" and "no" requirements, those are the only answers that make a juror's position "unmistakably clear."

There is much to be gained from such a pronouncement. Certainly it is a greater affront to notions of comity to subject voir dire in every capital case to repetitive review, than to establish specific guidelines state courts must follow. Further, there is no need to await experimentation in state and circuit courts; the bounds of Witherspoon clearly are set out in that decision. In the interests of federalism, and conservation of judicial resources, as well as the protection of compelling constitutional rights, petitioner suggests this case is an appropriate vehicle in which to propound mandatory Witherspoon standards. In any event, the trial court erred in allowing the dismissal of Juror Cannon.

III. The Petitioner's Conviction And Subsequent Death Sentence Were Assessed In Violation Of Due Process Because The Trial Court Refused To Determine Whether The Sequestered Petit Jury Was Improperly Influenced As A Result Of Viewing Televised Accounts Of, And Commentaries About, The Attempted Assassination Of President Ronald Reagan.

The Dobard jury was impaneled on March 30, 1981, and sequestered for the duration of the trial and sentencing. Sequestration of jurors, particularly in capital cases, serves two purposes: (1) "nothing shall occur outside of the trial which [could] disturb their minds, leaving the jury entirely occupied with consideration of the case which they are sworn to try," Leith v. State, 206 Ala. 439, 443, 90 So. 687, 691 (1921); and (2) the jury should be free from all outside or improper influences or communications, Ray v. State, 257 Ala. 418, 59 So.2d 582 (1952). Accord Remmer v. United States, 347 U.S. 227, 74 S. Ct. 450 (1954). On the same day the Dobard jury was sequestered John Hinkley, Jr. attempted to assassinate the President of the United States, an event attended by extensive media coverage and commentary. Yet, despite the importance of sequestration, the trial judge found, as a fact, that jurors were permitted to view television accounts of the assassination attempt.

In flagrant disregard of all customary due process principles, to this date no court has ascertained what it was the jury saw, or what effect the media coverage might have had on the trial of this case. Trial counsel sought to question the jury while they were still impaneled (R. 774, 775), but that request was dismised abruptly. At every subsequent stage of this proceeding counsel has identified the problem and requested relief. At every stage relief was denied.

Proceedings before the Alabama Supreme Court were no exception; that court's cursory review fails to do justice to petitioner's due process claim. First, the court addressed only the federal due process issue, ignoring the state constitutional claim altogether. Second, the only analysis done under the federal due process claim was to distinguish two state cases cited by petitioner in brief. Third, with no basis in the record, the Alabama Supreme Court decided as a matter of fact that viewing media coverage of the assassination attempt "did not influence the jurors to the extent that they would have acted without evidence." Ex Parte Dobard, supra, 435 So.2d at 1354. Finally, the Alabama Supreme Court failed entirely to address the influence of the media commentary on the jurors in the sentencing phase of the trial.

"[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639 (1961). "The right to a trial by an impartial jury lies at the very heart of due process." Smith v. Phillips, 455 U.S. 209, 102 S. Ct. 940, 950 (1982) (Marshall J., dissenting). This Court, and the lower federal courts, have emphasized the importance of the impartial jury right in numerous contexts.

E.g., Irvin v. Dowd, supra (pretrial publicity); Remmer v. United States, 347 U.S. 227, 74 S. Ct. 450 (1954) (private communication with juror); United States v. Bagnariol, 665 F.2d 877, 883-84 (9th Cir. 1981) (extra-record information sought by juror), cert. denied, 102 S. Ct. 2040 (1982); Paz v. United States, 462 F.2d 740 (5th Cir. 1972) (extra-record materials in jury room).

In United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981), the court conducted an exhaustive study of federal cases in which juror partiality was questioned as a result of jurors coming into contact with individuals, or information, outside the contours of the case. The Bagnariol court's study reveals the following general rule, applicable throughout the federal courts:

> The trial court, upon learning of a possible incident of juror misconduct, must hold an evidentiary hearing to determine the precise nature of the extraneous information. The defendant is entitled to a new trial if the judge finds a "possibility that the extrinsic material could have affected the verdict."

Id. at 885, quoting United States v. Vasquez, 597 F.2d 192, 193 (9th Cir. 1979). Accord Smith v. Phillips, 455 U.S. 209, 215, 102 S. Ct. 940, 945 (1982) (remedy for allegation of juror partiality is hearing);[13] Remmer v. United States, supra, 347 U.S. at 229, 74 S. Ct. at 451 (private communication with juror gives rise to presumption of prejudice; remedy is hearing to ascertain whether contact was harmless); Paz v. United States, supra, 462 F.2d at 745-46 (once it is ascertained extra-record

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[13] Smith, decided this past term, indicates the burden is on the defendant to prove "actual bias" on the part of the juror. Although arguably this conflicts with the standard that the verdict must be reversed if there is a "possibility" the extrinsic material affected the verdict, Smith, on its facts, is a somewhat different case than the "extrinsic material" cases. Smith involved a juror applying for a job in the prosecutor's office. Smith, however, is in accord with the other cases in holding the initial step to remedy a claim of impartiality is a hearing.

books were before jurors, remedy is remand for hearing to see if any "possibility" extrinsic material affected verdict).

Alabama law applies an even stricter test than federal law. With the exception of the present case, the Alabama Supreme Court consistently has recognized the need to keep the jury "separated from, and uninfluenced by, the outside world." Oliver v. State, 232 Ala. 5, 10, 166 So. 615, 617 (1936). Accord Brickley v. State, 286 Ala. 546, 548-49, 243 So.2d 502, 507 (1970); Seekers v. State, 35 Ala. App. 40, 43, 44 So.2d 628, 631, cert. denied, 253 Ala. 420, 44 So.2d 633 (1949). Under Alabama law, the party attacking the partiality of the jury only has the burden of demonstrating that it was subject to some "vitiating influence."

> The test of vitiating influence is not that it did influence a member of the jury to act without evidence, but that it might have unlawfully influenced that juror and others with whom he deliberated, and might have unlawfully influenced its verdict rendered."

Oliver v. State, 232 Ala. 5, 10, 166 So. 615, 617 (1936). See also Ex Parte Dobard, 435 So.2d 1351, 1354 (Ala. 1983) (purporting to apply test); Woods v. State, 367 So.2d 982, 984 (Ala. 1978) (issue not whether events did influence juror, but whether events might have influenced juror) (emphasis in original.) Once that influence is shown, the onus of showing that no prejudice resulted from the "vitiating influence" is upon the prosecution. Oliver v. State, 232 Ala. 5, 166 So. 615 (1936); See also Woods v. State, 367 So.2d 982, 984 (1978) (prosecution raises issue of vitiating influence; burden shifts to defendant to rebut).

In the instant case the trial court violated principles of both federal and state due process when it failed to pursue the matter once the defense presented the court with evidence that a "vitiating influence" had reached the sequestered jurors. In this context, the state Supreme Court's "holding"--that viewing the assassination attempt did not influence the jurors--is

absurd, as it is unsupported by any evidence. The Alabama Supreme Court stated:

> Whatever "editorial message" the jurors in this case could have gleaned from the news accounts of the attempts on President Reagan's life was certainly unrelated and detached from their deliberations about this case. To hold otherwise would be to delve into boundless speculation.

With all due respect, in the face of the lower court's refusal to pursue the matter, it is "boundless speculation" to assume anything but that the jurors were influenced. Any other speculation is forbidden by Alabama law. E.g., Brickley v. State, 286 Ala. 546, 550-51, 243 So.2d 502, 507 (1970); Seekers v. State, 35 Ala. App. 40, 45 44 So.2d 628, 633, cert. denied, 253 Ala. 420, 44 So.2d 633 (1949). This Court should be reluctant, particularly in a capital case, to attribute such omniscience to the Supreme Court of Alabama, which evidently made its finding without any evidence in the record.

The Alabama Supreme Court's legal analysis of petitioner's federal claim also was inadequate, limited as it was to distinguishing two state cases cited by petitioner: Seekers v. State, 35 Ala. App. 40, 44 So.2d 628 (Ala. Cir. App. 1949), cert. denied, 253 Ala. 420, 44 So.2d 633 (1950); Styles v. State, 129 Ga. 425, 59 S.Ct. 249 (1907). Further, even this limited analysis by the Alabama Supreme Court is disingenuous; both cases are distinguished from Dobard on their facts, with no regard for the legal holdings. In reality, both Seekers and Styles provide strong support for petitioner's position.

In Styles a jury sequestered in a capital case was permitted to read the local newspaper which contained an editorial, unrelated to the case before the jury, but generally to the effect that juries in capital cases were not doing their part to

enforce state laws. The Styles court held that when improper material is brought before a jury, the defendant is presumed prejudiced and a new trial must be granted unless the prosecution rebuts the presumption. 129 Ga. at 431, 59 S.E. at 252. The court expressly noted:

> Whether, after reading the article, the jurors would again have said that their minds were perfectly impartial between the state and the accused, or that there was no bias or prejudice resting upon their minds, either for or against the accused, we have no means of knowing. Those questions were not again put to the jurors.

Id., 129 Ga. at 428, 59 S.E. at 250. Likewise, here, the trial judge refused to poll the jury concerning the effect coverage of the attempted assassination had on the capital jury, despite repeated requests by counsel.

In Seekers v. State, supra, which relied heavily on Styles, the jury was permitted to attend a movie theatre. The film viewed by the jury was excessively violent. The Alabama Court of Appeals held:

> . . . we are confronted with only the evidence introduced by the appellant in support of his motion for a new trial. We would be compelled to enter into the realm of speculation, conjecture and surmise to hold that by witnessing the performance the jury was not unduly influenced against the interests of the accused.

Id., 35 Ala. App. at 45, 44 So. 2d at 632-33. The court declined to so speculate, and ordered a new trial. Id.

The Alabama Supreme Court seeks to distinguish the two cases, because in both the content of the medium viewed bore great similarity to the facts at trial. The Styles court, however, disclaimed such a limited holding:

> It is insisted that the defendant could not have been injured, because the article did not make reference to the particular case on trial. The fact that the case is not specially named does not necessarily deprive the argument for convictions, as contained in the editorial, of its injurious effect.

> The argument made no exceptions and was addressed to all prosecutions in murder cases which in general terms embraced the case under consideration.

129 Ga. at 428-29, 59 S.E. at 250-51 (emphasis supplied). In this case, the editorialization surrounding the attempted assassination of the President surely would have prejudicial effect; particularly so in this case because the jury was not only to determine guilt but also to decide whether Dobard was to receive a sentence of death.

Further, facts relied upon by the Alabama Supreme Court to distinguish the Seekers case were not relied upon by the Seekers court itself. The Seekers court did admonish, however:

> The courts generally are very emphatic in condemning and disapproving the practice of allowing jurors impaneled in grave criminal cases to attend any form of public entertainment.

Seekers v. State, supra, 35 Ala. App. at 44, 44 So. 2d at 631 (emphasis supplied). Noting the jury was given the task, not only of finding guilt or innocence, but of affixing punishment as well, 35 Ala. App. at 45, 44 So.2d at 632, the Seekers court held, in the absence of proof of harmless error by the state, that a new trial must be held.

The Alabama Supreme Court's opinion in this case simply fails to address the issue presented. When trial counsel realized the jury may have viewed prejudicial material, he promptly raised the question. The jury still was impaneled. Counsel requested a poll. The trial court ignored the request for a poll but "assumed" that the jurors had viewed the television accounts and commentaries. (R. 774). Refusal to so poll the jury, or to otherwise hold a hearing to determine prejudice, constituted reversible error.

In Styles v. State, supra, the Supreme Court of Georgia stated:

> The state is jealous of the rights and liberties of its people. When one of its citizens is accused of crime, it throws around him all the safeguards that are

> possible, in order to procure him a fair and impartial trial. . . . The law contemplates that, when a jury are selected and sworn to try a citizen for felony, they shall be entirely separated from the world, and that no communication whatsoever shall be had with them from the beginning of the trial until the verdict is rendered, unless by leave of the Court. It contemplates that no outside influence shall be brought to bear on the minds of the jury, and that nothing shall occur outside of the trial which shall disturb their minds in any way; that the minds of the jury shall be entirely occupied with the consideration of the case which they are sworn to try.

129 Ga. at 432, 59 S.E. at 262 quoting Shaw v. Shaw, 83 Ga. 92, 9 S.E. 768. Both Styles and Shaw are forebears to Alabama law in this area. See Seekers v. State, 35 Ala. App. 40, 44 So.2d 628, 631-32 (1949), cert. denied, 253 Ala. 420, 44 So.2d 633 (1950) (relying on Styles and Shaw). It is regrettable that in this case the Supreme Court of Alabama has seen fit to be considerably less jealous of the "rights and liberties" of petitioner Dobard, but that being so, petitioner properly looks to this Court for redress, Barefoot v. Estelle, 103 S. Ct. 3383, 3391 (1983), and requests the writ issue.

CONCLUSION

For the reasons stated above, and so that Percy Leo Dobard is not electrocuted without being given a fair trial and review of his sentence, the Petition should be granted.

Submitted by,

Ralph I. Knowles, Jr.
DRAKE, KNOWLES & PIERCE
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Tuscaloosa, Alabama 35402

Barry E. Friedman
University of Alabama
School of Law
Post Office Box 1435
University, Alabama 35486

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that prior to filing the foregoing or immediately thereafter, I caused to be mailed a true and correct copy of same, United States postage prepaid, and correctly addressed to Ed Carnes, Assistant Attorney General, State of Alabama.

Done this 2 day of November, 1983.

Attorney for Petitioner

IN THE 83-5695

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. A-185

RECEIVED
NOV 3 1983
OFFICE OF THE CLERK
SUPREME COURT, U. S.

PERCY LEO DOBARD,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

MOTION TO PROCEED IN FORMA PAUPERIS

The Petitioner, Percy Leo Dobard, does hereby request, pursuant to Rule 46, Supreme Court Rules, that he be allowed to proceed in this Court in forma pauperis.

The Alabama Supreme Court, Court of Criminal Appeals, and the Circuit Court of Marengo County, Alabama, have all found the Petitioner to be indigent, appointed counsel for him and allowed him to proceed in forma pauperis.

The in forma pauperis affidavit of the Petitioner is attached.

Submitted by,

Ralph I. Knowles, Jr.
DRAKE, KNOWLES & PIERCE
Post Office Box 86
Tuscaloosa, AL 35402

Barry E. Friedman
University of Alabama
School of Law
Post Office Box 1435
University, Alabama 35486

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that prior to filing the foregoing or immediately thereafter, I caused to be mailed a true and correct copy of same, United States postage prepaid, and correctly addressed to Ed Carnes, Assistant Attorney General, State of Alabama.

Done this 2nd day of November, 1983.

Attorney for Petitioner

I do now own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing).

If I were able to support them, the following persons would be dependent upon me for support. My relationship to those persons is listed.

Name	Relationship
MRS. LINDA BERLEVAUX DOBARD	WIFE
BRIAN BERLEVAUX	SON
RACHEL DOBARD	SON

The above statements are true and I understand that a false statement made herein will subject me to penalties of perjury.

Percy Leo Dobard

Subscribed and sworn to before me this 27 day of October, 1983.

NOTARY PUBLIC

3-25-85

IN THE

SUPREME COURT OF THE UNITED STATES

PERCY LEO DOBARD,	)	OCTOBER TERM, 1983
	)	
PETITIONER,	)	
	)	
VS.	)	NO. A-185
	)	
STATE OF ALABAMA,	)	
	)	
RESPONDENT.	)	

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Percy Leo Dobard, being first duly sworn, depose and say that I am the Petitioner, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress. I was found to be indigent by the trial and appellate courts of Alabama and was appointed counsel through the Supreme Court of Alabama.

I am not presently employed. I have not received within the past twelve (12) months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends or other sources.

The total value of any cash and items owned by me is $0.00.

APPENDIX A

APPENDIX A—Continued

ant to death. The Defendant, after being asked if he has anything further to say why sentence of law should not be now imposed upon him, says nothing.

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that the Defendant, Percy Leo Dobard, is sentenced to death by electrocution as provided by the laws of the State of Alabama. The execution of the sentence of death is suspended, pending the automatic appeal required by law. It is further ORDERED that David Reid, Livingston, Alabama, is appointed to represent the Defendant on appeal and an appeal to the Court of Criminal Appeals of Alabama is entered as required by law.

It is further ORDERED that the Defendant, Percy Leo Dobard, remain in custody during the pendency of the appeal, and that the Sheriff of Sumter County, Alabama, forthwith transport the Defendant to the William C. Holman unit of the prison system and deliver him to the custody of the Warden of William C. Holman unit of the prison system at Atmore, Alabama.

All DONE and ORDERED this, the 13th day of April, 1981.

/s/ Claud D. Neilson
CLAUD D. NEILSON
CIRCUIT JUDGE

Ex parte Percy Leo DOBARD.

(Re: Percy Leo Dobard

v.

State of Alabama).

81-899.

Supreme Court of Alabama.

July 8, 1983.

Rehearing Denied Aug. 5, 1983.

Defendant was convicted in the Circuit Court, Marengo County, Claud D. Neilson, J., of murder of a police officer while on duty, and he appealed. The Court of Criminal Appeals, 435 So.2d 1336, affirmed. The Supreme Court, Embry, J., held that: (1) there was no showing that "young blacks" were excluded from jury; (2) two jurors who expressed unequivocal opposition to death penalty were properly removed for cause; (3) defendant was not deprived of right to fair trial by news media coverage of assassination attempt on President Reagan which occurred during trial; (4) prosecutor did not impermissibly comment on defendant's exercise of his right to remain silent; and (5) imposition of death penalty was not disproportionate.

Affirmed.

1. Criminal Law ⇐855(8)

Jury's exposure to media coverage of assassination attempt on life of president of the United States, which occurred during defendant's capital murder trial, did not deprive defendant of his right to a fair trial.

2. Jury ⇐33(5.1)

Record did not support defendant's contention that state used peremptory strikes in an unconstitutional manner by systematically excluding young blacks from the jury, which was composed of seven blacks and five whites.

3. Jury ⇐108

No venireman may be removed for cause unless it is determined that his views as to capital punishment are so strong that he would automatically refuse to impose the death sentence regardless of the evidence produced.

4. Jury ⇐108

Prospective juror who indicated that she would not be able to return a guilty verdict if if meant the imposition of the death penalty and prospective juror who indicated that he had a fixed opinion against capital punishment regardless of

what the evidence might be were properly removed for cause.

5. Jury ⇐131(17)

Prosecutor's questioning on voir dire which asked jurors to promise that, if the state proved beyond a reasonable doubt and to a moral certainty that defendant was guilty of the capital offense as charged, they would return a verdict that would place defendant in the electric chair and cause his death did not improperly elicit from the jurors the promise to impose the death penalty if defendant was found guilty.

6. Criminal Law ⇐1180

Defendant who did not present additional facts to the Court of Criminal Appeals by way of application for rehearing could not, on appeal to the Supreme Court, argue facts not mentioned by the Court of Criminal Appeals. Rules App.Proc., Rule 39(k).

7. Homicide ⇐354

In view of evidence that defendant fired shots which killed police officer, imposition of the death penalty was permissible.

8. Criminal Law ⇐983

In view of evidence that it was defendant who fired fatal shots at police officer and that his culpability was greater than that of his accomplice, imposition of death penalty on defendant was not disproportionate to sentence of accomplice, who received a term of years.

9. Criminal Law ⇐1206.6(5)

State must prove aggravating circumstances justifying death penalty beyond a reasonable doubt.

10. Homicide ⇐354

Evidence that defendant robbed a restaurant and then drove at high speeds for some 30 miles, that he was stopped by a police officer, and that the officer was shot shortly after approaching window of defendant's vehicle was sufficient to show aggravating circumstances warranting imposition of death penalty.

11. Criminal Law ⇐986.2(1)

Judge and jury should consider both statutory and nonstatutory mitigating circumstances in determining whether to impose the death penalty; that should include all relevant evidence which includes not only why a death sentence should be imposed but also why it should not be imposed.

12. Criminal Law ⇐986.6(1)

Fact that nonstatutory mitigating circumstances were not listed in sentencing report did not show conclusively that they were not considered by jury which was instructed to consider all mitigating circumstances.

13. Homicide ⇐354

In order for the death sentence to be imposed, an intentional killing with aggravation must be shown.

14. Indictment and Information ⇐113

Both an intentional killing and aggravation must be averred in complaint in order for death penalty to be imposed. Code 1975, § 13A-6-85.

15. Homicide ⇐139

Indictment which charged that defendant did, unlawfully and with malice aforethought, intentionally cause the death of another by shooting him with a pistol while the victim was a police officer on duty averred both the gravamen of the capital offense and the required aggravation. Code 1975, § 13A-6-85.

16. Criminal Law ⇐721(3)

Where there is a possibility that a prosecutor's comment could be understood by the jury as a reference to defendant's failure to testify, constitutional right to remain silent is violated.

17. Criminal Law ⇐721(5)

Although defendant and his female companion were the only persons who could testify to events surrounding shooting of victim, prosecutor's closing argument that there was no evidence before the jurors which would lead them to believe that defendant's companion had shot the police

officer and that the evidence was undisputed that defendant had shot and killed the police officer was not an impermissible comment on defendant's failure to testify.

David A. Reid, Livingston, for petitioner.

Charles A. Graddick, Atty. Gen. and Ed Carnes and Jean Williams Brown, Asst. Attys. Gen., for respondent.

EMBRY, Justice.

This case is a review of the conviction of the petitioner, Percy Leo Dobard, for violation of § 13A-5-31(a)(5), Code 1975, murder of a police officer on duty. After a separate sentencing hearing, Dobard was sentenced to death by electrocution. The Court of Criminal Appeals affirmed the conviction and sentence on 29 June 1982. This court issued the writ of certiorari and now affirms the decision of the Court of Criminal Appeals.

After a careful review of the record, this court adopts the findings of fact as set forth by the late Judge Barron:

"Some time between 5:00 a.m. and 6:00 a.m. on Saturday, June 21, 1980, O'Jim's Restaurant in Eutaw, Alabama was robbed by appellant and a female companion, Jeanette Kennedy. After Kennedy left the restaurant, appellant pulled a pistol on waitress Corethea Hilton and demanded 'give me all your money.' Ms. Hilton complied with the demand. Appellant and Kennedy speedily fled, and Ms. Hilton called the Eutaw Police.

"About 35 miles from the scene of the robbery, appellant, who was driving the getaway vehicle, was spotted by Livingston University Police Officer Wayne Sudduth, who was assisting in the search for the suspects. Officer Sudduth was aware that the robbery had occurred and apparently had knowledge of the description of the getaway vehicle from a police radio broadcast.

"Officer Sudduth informed Livingston Police Officer Raymond Burne that he was stopping the vehicle. Officer Sudduth, who was dressed in a blue uniform, was driving a marked police car.

"With his flashing lights on, Officer Sudduth stopped the vehicle which contained appellant and Kennedy. He approached the driver's side of the car and asked for appellant's driver's license. Appellant opened the car door and reached around as if to get his billfold. However, according to the testimony of witness Kennedy, rather than removing his billfold he grabbed a .38 caliber revolver and shot Officer Sudduth, killing him. The evidence indicated that officer Sudduth did not have his service revolver drawn, as it was found in his holster with the safety strap in place.

"After the shooting of officer Sudduth, appellant and Kennedy sped away, only to wreck their vehicle on the western edge of Livingston. Both exited the car and walked up the road where they hid in some bushes until a truck driven by Mr. Johnny Mathews approached. Mathews saw appellant come from under a bridge and act as if he were injured. Mathews stated that appellant was yelling for help and he stopped his truck on the side of the road. When appellant came within close proximity of the truck, he pulled the revolver, pointed it at Mathews's face and demanded the keys to the truck. After a brief period of time, during which Sumter County Deputy Sheriff Ralph Rainey drove past appellant, Kennedy, and Mathews, appellant secured the keys and fled with Kennedy.

"Deputy Rainey reported what he had seen to the Livingston Police Department and was informed that he had observed the restaurant robbery suspects. Deputy Rainey set a roadblock and while moving his patrol car to allow a vehicle to pass, appellant drove Mathew's truck past him. A high speed chase ensued involving several vehicles.

"Another roadblock had been set by York City police officers about halfway between Livingston and York. As the truck approached, the officers at the roadblock began to fire at it. Immediately thereafter, the truck wrecked and

overturned. Subsequently, Deputy Rainey saw appellant throw a gun out of the truck cab. Deputy Rainey immediately retrieved it. Appellant and Kennedy were taken into custody, transported to a local hospital for examination, and afterwards taken to Sumter County Jail."

The petitioner raises six issues on this review.

I.

The first issue posed by the petitioner is whether the media coverage surrounding the attempted assassination of President Reagan improperly influenced the jury and thereby denied petitioner the right to a fair trial as guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States.

During the last two days of sequestration, all the members of the jury were allowed to, and did view on television, news accounts of the assassination attempt on President Reagan. The petitioner contends this exposure unlawfully influenced the jury by encouraging them to convict the petitioner. While it is not delineated in the record precisely which news accounts the jury actually viewed, the petitioner claims the news accounts were riddled with editorialization. The subliminal message allegedly transmitted to viewers was that something was wrong with America and Americans must take action. The available course of action for the jury, argues the petitioner, was to convict the petitioner of a capital crime. In support of this argument the petitioner relies principally upon the doctrine of *Seekers v. State*, 35 Ala.App. 40, 44 So.2d 628, *cert. denied*, 253 Ala. 420, 44 So.2d 633 (1949).

In *Seekers* the jury was taken to a movie which bore striking similarities to the case being tried. The crime charged, and that portrayed in the movie, were both of a violent nature. The location of the victim's wounds in both instances was the same. Earlier that day, the jury had heard medical testimony concerning the wounds. Lastly, the film presented detailed accounts of the trial and convictions of the villains. Considering the similarities between the film and the trial, the court noted: "We would be compelled to enter into the realm of speculation, conjecture and surmise to hold that by witnessing the performance the jury was not unduly influenced against the interests of the accused." *Seekers*, *supra*.

[1] *Seekers* and the case at bar, however, are distinguishable. Other than the violent nature of the crimes involved, the assassination attempt and petitioner's case bear few if any similarities. This court does not find that the news accounts complained of influenced the jury in the present case. Similarly, this court does not find that television coverage of the event influenced the jury through editorialization to the extent shown by *Styles v. State*, 129 Ga. 425, 59 S.E. 249 (1907), as petitioner contends.

In *Styles*, the jury, while sitting for a murder case, was permitted to read an editorial criticizing jurors for their reluctance to convict murderers. The obvious impact and influence such an editorial could promulgate is not present here. Whatever "editorial message" the jurors in this case could have gleaned from the news accounts of the attempts on President Reagan's life was certainly unrelated and detached from their deliberations about this case. To hold otherwise would be to delve into boundless speculation.

"The test of vitiating influence is not that it did influence a member of the jury to act without evidence, but that it might have unlawfully influenced that juror and others with whom he deliberated, and might have unlawfully influenced its verdict rendered." *Roan v. State*, 225 Ala. 428, 435, 143 So. 464, 460 (1932). We hold the exposure to television coverage of the assassination attempt on President Reagan did not influence the jurors to the extent that they would have acted without evidence. Accordingly, the trial judge properly denied petitioner's motion for a new trial based on these grounds.

II.

[2] The second contention raised is that the State used its peremptory strikes in an unconstitutional manner by systematically excluding "young blacks" from the jury. Petitioner is black and his victim, Officer Sudduth, was white. The jury was composed of seven blacks and five whites. This issue falls squarely under the tutelage of *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759, *reh. den.*, 381 U.S. 921, 85 S.Ct. 1528, 14 L.Ed.2d 442 (1965).

In order to make a constitutional claim under the doctrine of *Swain*, petitioner must allege a systematic use of peremptory challenges against blacks over a period of time. *Swain*, 380 U.S. at 227, 85 S.Ct. at 839. Otherwise, the presumption that the prosecutor is utilizing the State's strikes in a fair and impartial manner must stand. *Id.*, at 222, 85 S.Ct. at 837. Petitioner has failed to meet the burden of proof announced in *Swain*. Consequently, his claim must fail. *Accord Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

Additionally, we recognize, as did the Court of Criminal Appeals, that *Allen v. State*, 414 So.2d 163 (Ala.Cr.App.1982), most recently resolved this issue adversely to the petitioner. *See also Lopez v. State*, 415 So.2d 1204, 1209 (Ala.Cr.App.1982).

III.

Petitioner's next contention is that he was denied an impartial jury as guaranteed by the United States and Alabama Constitutions. The contention is based on two grounds: (1) Two veniremen were excused for cause due to their opposition to capital punishment, in contradiction of the holding of *United States v. Witherspoon*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); (2) The prosecutor improperly secured a "promise" from the jury during voir dire that they would sentence the defendant to death if guilt was shown. We reject this contention whether based on either ground.

[3] In *Witherspoon* the Supreme Court held: "[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.*, at 522, 88 S.Ct. at 1777. This position was reaffirmed in *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1972). Consequently, no venireman may be removed for cause unless it is determined that his views as to capital punishment are so strong that he "would automatically refuse to impose a death sentence regardless of the evidence produced." *Liddell v. State*, 287 Ala. 299, 251 So.2d 601, 610 (1971).

The petitioner challenges the removal of veniremen Daisy Cannon and Sim McCasson. Regarding prospective juror Cannon the record reflects the following:

"MR. WATKINS [Prosecutor]: Yes, sir. Ladies and Gentlemen, the Judge has already qualified you on capital punishment, but I would like to go into it a little bit further to make sure that we understand each other.

"This case that we are going to try is one of the cases enumerated in the statute that says that a person may receive death if you find him guilty of a certain offense; and, I want to know if we all understand each other, that each of you are telling me individually, that if you believe beyond a reasonable doubt and to a moral certainty the necessary elements to return a verdict, which would mean that this person would be put to death by electrocution, that you would be able to do that? Is that what everybody is telling me? Is there anybody that would not be able to do that?

"PJ: I don't believe I would.

"THE COURT: All right; would you please stand up and give your name, please ma'am?

"PJ CANNON: Daisy Cannon. And, I just don't believe I could send anyone to the electric chair.

"Mr. WATKINS: [Prosecutor]: Mrs. Cannon, are you telling the Court that no matter what the evidence is; that if you

believe beyond a reasonable doubt and to a moral certainty that this person did it; that if we follow the statute to show that we can prove all the necessary elements, that you would not be able to vote guilty if it meant that he would be sent to death?

"PJ CANNON: I don't think I would."

Prospective juror McCasson's comments may also be found in the record:

"THE COURT: In this case, the State of Alabama, if the defendant is found guilty of the charge in the indictment, has indicated they plan to ask for the death penalty if the defendant is found guilty beyond a reasonable doubt as charged. Now, is there anyone on the jury panel that has a fixed opinion against capital punishment? In other words, does anyone have a strong feeling, a fixed opinion, against capital punishment? If so, I would like to see a show of hands.

"Yes sir. Mr. McCasson. You have an opinion against capital punishment?

"PJ McCasson: Yes, sir.

"THE COURT: And, you do not feel that you would be able to return a verdict sentencing someone to the electric chair if they were found guilty beyond a reasonable doubt and to a moral certainty of the crime of the charges, is that correct?

"PJ McCASSON: My opinion about it, I think it should be some other way without taking a life for a life.

"THE COURT: All right; I understand and I respect that, sir. I am just trying to ascertain each one of your opinions. So, it is your view that you have a fixed opinion against capital punishment?

"PJ McCasson: Yes, sir.

"THE COURT: No matter what the evidence would be in a case you would not be able to vote for capital punishment?

"PJ McCASSON: Yes, sir."

[4] The court finds it difficult to envision how either prospective juror could have been more explicit in expressing an unqualified opposition to the death penalty. Accordingly, under *Witherspoon* and *Liddell*, prospective jurors Cannon and McCasson were properly removed for cause.

The second facet of voir dire with which petitioner takes issue, the prosecutor's questioning, may also be found in the record.

"MR. WATKINS: . . . It is my understanding from you that we all understand that the State has the burden of proving to you beyond a reasonable doubt and to a moral certainty, that this man is guilty as charged. I'm asking you to go one step further in assuming that the State of Alabama proves to you beyond a reasonable doubt and to a moral certainty that this man is guilty of the capital offense as charged, will all of you promise to me that you will be about [sic] to return a verdict that will place him in the electric chair and cause his death? Everybody, search your conscience now and answer it honestly because that's all we want to know is what you are thinking and how you feel. Would each of you tell me that if I prove to you, the State proves to you, beyond a reasonable doubt and to a moral certainty that this man is guilty as charged of a capital offense, that you will be able to vote for the death penalty?

". . .

"MR. WATKINS: I take it by your silence that you all will.

"Thank you. That's all."

Petitioner argues that this line of questioning amounted to a promise, between the prosecutor and the jury, to return a sentence of death if the defendant was shown to be guilty. We cannot agree.

[5] Concededly, this question does contain the word "promise." However, this word must be considered in its full context. Most importantly, the phrase "will be able" indicates that the prosecutor is not looking for a commitment from the jurors, but rather simply seeking to ascertain whether the jury has the capacity to fulfill its duty. In our view, this line of questioning is proper.

IV.

Petitioner's fourth contention is that the imposition of the death sentence in this case constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. We cannot agree.

The petitioner concedes that the death sentence is not *per se* unconstitutional, but nevertheless argues that a sentence of death in the instant case is inconsistent with the holding of *Enmund v. Florida*, — U.S. —, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

In *Enmund* the Supreme Court held that the Eighth Amendment prohibited the imposition of the death sentence upon a defendant who aided and abetted in the commission of a robbery, in the course of which a murder was committed, but where no evidence was offered to show that the defendant actually killed or intended to kill anyone. *Id.*, at 3377.

[6] In an attempt to square the facts in the case at bar with those presented in *Enmund*, petitioner argues a collage of facts not mentioned by the Court of Criminal Appeals. We note that in doing so, petitioner has failed to comply with the provision of ARAP 39(k) which provides in pertinent part:

"If the petitioner is not satisfied with that [Court of Criminal Appeals'] statement of facts, he may, on application for rehearing in that court, present any additional or corrected statement of facts and request that court to add or correct those facts in its opinion on rehearing. If the court fails to accede to this request, petitioner may copy the statement in the petition to this court, with references therein to the pertinent portions of the clerk's record and reporter's transcript, and it will be considered along with the statement of facts in the opinion of the appellate court, if found to be correct."

Furthermore, after careful review of the entire record, we find no plain error or defect in the proceedings below. Therefore, we limit our considerations to the facts set out by the Court of Criminal Appeals. ARAP, 39(k).

[7] Overwhelming evidence of record shows that Dobard pulled the trigger, firing the shots that killed Officer Sudduth. Consequently, we find no merit to petitioner's contention that *Enmund v. Florida*, — U.S. —, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), precludes imposition of the death penalty in this case.

[8] We also reject petitioner's argument regarding disproportionate sentencing, as the petitioner clearly bears more culpability than his accomplice, Kennedy. *Lockett v. Ohio*, 438 U.S. 586, 606, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978); *Beck v. State*, 396 So.2d 645, 664 (1981).

Petitioner argues further that the trial court's findings of aggravating circumstances were erroneous, as one circumstance was already charged in the indictment. Under the doctrine of *Keller v. State*, 380 So.2d 926, 937 (Ala.Cr.App.), *cert. denied*, 380 So.2d 938 (Ala.1980), argues petitioner, one circumstance may not serve the dual purpose of both charge and aggravating circumstance.

The trial court noted two aggravating circumstances: (1) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest; and, (2) The capital felony was committed while the defendant was engaged in flight after committing a robbery.

We noted in *Beck v. State*, 396 So.2d at 663:

"In Alabama, the aggravating circumstances constitute an element of the capital offense and are required to be 'averred in the indictment' (Code 1975, § 13-11-2), and must be proved beyond a reasonable doubt. Consequently, the jury verdict that the defendant was guilty of committing the capital offense would mean that the State had already established at least one aggravating circumstance, even though the legislature did not include an aggravating circumstance in § 13-11-6 to correspond with the 'aggravation' made a part of each capital

offense by § 13-11-2(a). In addition, the State would be permitted to offer evidence of any other aggravating circumstance contained in § 13-11-6, which was not 'averred in the indictment' but which was proved beyond a reasonable doubt at trial or by the evidence taken at the sentencing hearing . . ."

The doctrine of *Keller v. State*, 380 So.2d 926, is not applicable, as alleged, in the instant case. Therefore, we reject petitioner's argument in this regard.

Additionally, petitioner asserts that the State fell short of showing that the murder was committed while the defendant was engaged in flight after committing a robbery. We do not agree.

[9, 10] The State must prove aggravating circumstances "beyond a reasonable doubt." *Beck v. State*, 396 So.2d at 663. We find that the State proffered sufficient evidence to meet this burden. Testimony indicated that the petitioner robbed O'Jim's restaurant and then drove at high speeds for some thirty miles. Officer Sudduth's lights were flashing when he detained petitioner. Officer Sudduth was shot shortly after approaching the window of Dobard's vehicle.

[11] Petitioner insists that the trial judge and jury failed to consider nonstatutory mitigating circumstances in rendering a sentence of death. In support of this contention petitioner offers the sentencing order of the trial court, which fails to mention any nonstatutory mitigating circumstances. The judge and jury should consider both statutory and nonstatutory mitigating circumstances. *Beck v. State*, 396 So.2d at 668. This should include all relevant evidence that indicates "not only why a death sentence should be imposed, but also why it should not be imposed." *Id.*, at 662. A review of the sentence hearing reveals the following instruction of the court to the jury:

"So those are the mitigating circumstances that the law of Alabama provides. In addition to mitigating circumstances that I just read to you, you may also consider as a mitigating circumstance any aspect of the defendant's character, his life, and any of the circumstances of the capital offense which tend to indicate that the defendant should not be sentenced to death. Mitigating circumstance does not have to be included on the list that I have read to you in order for you to consider it. Mitigating circumstances considered by you should be based on the evidence that you have heard. And if you are satisfied from the evidence presented during the guilt stage of the trial or during the sentencing hearing, that a mitigating circumstance exists in this case then you should consider it. Mitigating circumstance need not be proven to you—need merely be proven to your satisfaction. It does not have to be proven beyond a reasonable doubt for you to consider it. Only an aggravating circumstance has to be proven beyond a reasonable doubt and that burden is on the State."

[12] The fact that nonstatutory mitigating circumstances were not listed in the sentencing report is by no means conclusive that they were not considered. In light of the instructions given to the jury, it is clear that they were in fact considered.

We conclude: (1) The murder of a policeman on duty under the existing aggravating circumstances balanced against the mitigating circumstances is properly punishable by a sentence of death; (2) Similar crimes throughout the state are being punished capitally, *see Magwood v. State*, 426 So.2d 929 (Ala.Cr.App.1982); *Owen v. State*, 418 So.2d 214 (Ala.Cr.App.1982); *Watkins v. State*, 409 So.2d 901 (Ala.Cr.App.1981); and, (3) The sentence of death is appropriate when considered with the role and sentence of his accomplice Jeanette Kennedy. Accordingly, imposition of the death penalty was not error. *Gregg v. Georgia*, 428 U.S. 153, 198, 96 S.Ct. 2909, 2934, 49 L.Ed.2d 859 (1976); *Beck v. State*, 396 So.2d at 664.

V.

The fifth issue raised is whether the indictment sufficiently charges the petitioner

with a capital felony. The petitioner contends that the indictment is deficient as it fails to aver any aggravating circumstances enumerated in § 13A-5-35, Code 1975.

[13, 14] This issue may be resolved by turning to the guidance of *Kyzer v. State*, 399 So.2d 330 (Ala.1982). *Kyzer* made it clear that the gravamen of a capital offense is an "intentional killing." *Id.*, at 335. In order for the death sentence to be imposed, however, an intentional killing with aggravation must be shown. *Beck v. State*, 396 So.2d 645 (Ala.1980). Herein lies the distinction between the related concepts of aggravation and aggravating circumstances. The capital offenses set forth in § 13A-5-31 contain an "intentional killing," the gravamen, and aggravation. Both must be averred in the complaint. *Id.*, at 663. The aggravating circumstances listed in § 13A-5-35 are those considered during the sentencing hearing mandated by *Beck*.

This conclusion parallels that in *Kyzer*, where this court proclaimed:

> "If a defendant is convicted of 'murder in the first degree wherein two or more human beings are intentionally killed,' and if the jury, after a hearing conducted in accordance with the principles set out in *Beck*, fixes the penalty at death, the trial judge, if convinced that the 'aggravation' averred in the indictment 'that two or more human beings were intentionally killed by the defendant by one or a series of acts' outweighs the mitigating circumstances, may impose a sentence of death by setting forth in writing, as required by § 13-11-4, his findings, even though the 'aggravating circumstance' is not 'enumerated in § 13-11-6.' The jury could make the same finding at its sentence hearing mandated by *Beck*."

Kyzer, 399 So.2d at 338.

The indictment charging the petitioner reads as follows:

> "Percy Leo Dobard . . . did, unlawfully and with malice aforethought intentionally cause the death of another person, Carlton Wayne Sudduth, by shooting him with a pistol; while the said Carlton Wayne Sudduth was a police officer on duty as a Livingston University Security Police Officer under the provisions of Title 16-63-12, Code of Alabama, 1975 in violation of 13A-5-31 of the Code of Alabama against the peace and dignity of the State of Alabama."

[15] We find that this indictment avers both the gravamen of a capital offense, and the required aggravation, "while said Carlton Wayne Sudduth was a police officer on duty."

The trial court properly denied petitioner's motion to dismiss and overruled his demurrer to the indictment.

VI.

[16, 17] The final issue raised is whether the State's closing argument impermissibly commented upon the petitioner's failure to take the stand. The disputed comments read as follows:

> "There is no evidence before you that could give you any reason why you could think that Jeanette Kennedy shot Officer Sudduth as opposed to Mr. Dobard. The evidence is very clear. As far as I can see, and it is undisputed, that Percy Dobard shot and killed Officer Wayne Sudduth."

"[W]here there is the possibility that a prosecutor's comment could be understood by the jury as reference to failure of the defendant to testify, § 6 [Const. of Ala. of 1901] is violated." *Beecher v. State*, 294 Ala. 674, 682, 320 So.2d 727, 734 (1975). Additionally, we noted in *Beecher*:

> "*Where the State's evidence does stand uncontradicted*, the prosecutor does have the right to point this out to the jury. In that circumstance the prosecutor could say: 'There has been no refutation of any of the evidence presented by the State;' or more simply, 'The State's evidence stands uncontradicted,' or other appropriate comment to like effect." *Id.*

We hold that the prosecutor's comments in question *could not* have been understood as being a reference to the defendant's failure to testify, but rather fall squarely within the approved bounds of *Beecher*. Conse-

quently, the petitioner's constitutional rights were not violated.

For the foregoing reasons the judgment of the Court of Criminal Appeals is due to be and is hereby affirmed.

AFFIRMED.

TORBERT, C.J., and MADDOX, FAULKNER, JONES, ALMON, SHORES, BEATTY and ADAMS, JJ., concur.

Brenda Diane STORY, alias

v.

STATE.

5 Div. 659.

Court of Criminal Appeals of Alabama.

Nov. 23, 1982.

Rehearing Denied Dec. 28, 1982.

Defendant was convicted before the Tallapoosa Circuit Court, of possession of methaqualone, and she appealed. The Court of Criminal Appeals, DeCarlo, J., held that: (1) evidence on issue of constructive possession and knowledge of presence of drug under passenger seat of automobile was for jury; (2) prosecutor's remarks concerning drug problems were permissible; (3) defendant's rights were not prejudiced by refusal to hold a hearing on motion of former jeopardy; and (4) conviction for trafficking in marijuana will not bar a subsequent prosecution for possession of methaqualone where both offenses arise from the same circumstances.

Affirmed.

Reversed, Ala., 435 So.2d 1365, on remand, Ala.Cr.App., 435 So.2d 1367.

1. Searches and Seizures ⇐7(26)

Automobile passenger had no standing to challenge search of the vehicle where she asserted neither a proprietory nor possessory interest in the vehicle and no interest in cosmetic bag found under seat which she occupied.

2. Drugs and Narcotics ⇐117

Prima facie case of possession of a prohibited drug or substance must show constructive possession by the accused of a controlled substance plus knowledge on his part of the presence of the narcotic. Code 1975, 20-2-70.

3. Drugs and Narcotics ⇐117

Constructive possession of a narcotic requires proof beyond a reasonable doubt that defendant had knowledge of the drug's presence, which may be established by surrounding facts and circumstances. Code 1975, 20-2-70.

4. Drugs and Narcotics ⇐62, 114

Mere presence in an automobile where illicit drugs are found will not support a conviction for possession; however, unlawful possession may be inferred when presence is coupled with existence of additional evidentiary factors, and defendant's proximity to drugs is such an evidentiary factor. Code 1975, 20-2-70.

5. Drugs and Narcotics ⇐126

Where tablets containing methaqualone were found underneath automobile passenger seat occupied by defendant and witness testified that when he saw defendant earlier in the evening she had the bag in which the tablets were found, issues of constructive possession and knowledge of presence of the drug were for jury in prosecution for possession of methaqualone. Code 1975, 20-2-70.

6. Criminal Law ⇐867, 1155

Granting of a mistrial is within the sound discretion of the trial judge and his decision will not be disturbed on appeal unless clear abuse of discretion is shown.

APPENDIX B

Percy Lee DOBARD

v.

STATE.

2 Div. 386.

Court of Criminal Appeals of Alabama.

June 29, 1982.

Rehearing Denied July 27, 1982.

Defendant was convicted in the Circuit Court, Marengo County, Claud D. Neilson, J., of murder of police officer while on duty and he appealed. The Court of Criminal Appeals, Barron, J., held that: (1) press coverage of assassination attempt on President of United States which occurred during the trial did not prejudice defendant; (2) two jurors who expressed a refusal to return a guilty verdict if it meant the imposition of the death penalty were properly challenged for cause; (3) imposition of death penalty on defendant was not cruel and unusual punishment; (4) indictment was not required to set forth aggravating circumstances; (5) trial judge was not shown to have failed to consider nonstatutory mitigating factors; and (6) prosecutor did not improperly comment on defendant's failure to testify.

Affirmed.

Judgment affirmed, Ala., 435 So.2d 135.

1. Criminal Law ⇐856

Issue was not whether exposure to media coverage improperly influenced any member of the jury but whether it might have unduly affected any juror to act outside the evidence in arriving at a verdict.

2. Criminal Law ⇐856

Jury's exposure to media coverage of assassination attempt on the life of the President of the United States, which occurred during trial of the case, did not deprive defendant of his right to a fair trial.

3. Jury ⇐33(1.3, 5.1)

Record did not support defendant's claim of systematic striking of blacks or young blacks from petit juries or history of purposeful discrimination against a particular race.

4. Jury ⇐108

Prospective juror who indicated that she would not be able to return a guilty verdict if it meant the imposition of the death penalty and prospective juror who indicated that he had a "fixed opinion against capital punishment regardless of what the evidence might be were properly challenged for cause.

5. Jury ⇐131(17)

Questions asked of jurors on voir dire as to whether, if they believed beyond a reasonable doubt and to a moral certainty that the necessary elements had been proven, they would return verdict which would put the defendant to death by electrocution and which asked the jurors if they would be able to vote for the death penalty did not improperly elicit from the jurors the promise to impose the death penalty if defendant was found guilty.

6. Criminal Law ⇐1213

Imposition of death penalty upon defendant who was shown to have shot police officer shortly after having committed a robbery was not cruel and unusual punishment. U.S.C.A. Const.Amend. 8; Code 1975, § 13A-5-31(a)(5) (Repealed).

7. Homicide ⇐354

Evidence that defendant committed a robbery, that the automobile which he was driving was stopped some 30 miles from the robbery scene, and that defendant shot police officer was sufficient to sustain finding that the homicide occurred "in flight after committing a robbery," an aggravating circumstance justifying imposition of the death penalty.

8. Homicide ⇐354

Death penalty is appropriate punishment for the murder of a police officer.

9. Criminal Law ⇐983

In view of evidence that it was defendant, and not his female companion, who shot the police officer, death penalty imposed upon defendant was not excessive when compared with the 20-year sentence received by his companion.

10. Criminal Law ⇐1144.15

It would be assumed that jury followed trial court's instructions with respect to consideration of mitigating circumstances when considering penalty to be imposed for homicide.

11. Criminal Law ⇐986.2(1)

Failure of trial judge to specifically refer to the nonstatutory mitigating factors did not show that he failed or refused to consider them in sentencing defendant.

12. Indictment and Information ⇐113

Aggravating circumstances which may lead to imposition of death penalty are not a necessary and elementary part of the offense and are not required to be set forth in the indictment.

13. Criminal Law ⇐721(5)

Although defendant and his female companion were the only persons who could testify to the events surrounding the shooting of victim, prosecutor's closing argument that there was no evidence before the jurors which would lead them to believe that defendant's companion had shot the police officer and that the evidence was undisputed that defendant had shot and killed the police officer was not an impermissible comment on defendant's failure to testify.

14. Criminal Law ⇐1171.5

Where there has been a direct comment by the State on the defendant's failure to testify and the trial court has not acted promptly to cure that improper comment, the conviction must be reversed.

15. Criminal Law ⇐721(5)

Where the State's evidence stands uncontradicted, prosecutor has a right to point that out to the jury.

David A. Reid, Livingston, for appellant.

Charles A. Graddick, Atty. Gen., and Edward E. Carnes, Asst. Atty. Gen., and J. Anthony McLain and James P. Hampton, Sp. Asst. Attys. Gen., for appellee.

BARRON, Judge.

Appellant was convicted under § 13A-5-31(a)(5), Code 1975, for the murder of a police officer while on duty. After a separate hearing on aggravating and mitigating circumstances, the jury fixed his punishment at death. Subsequently, the trial court weighed the aggravating and mitigating circumstances pursuant to § 13A-5-33, Code 1975, and sentenced appellant to death. The court issued both oral and written findings of fact from the trial and the sentence hearing which enumerated the aggravating circumstances the court found sufficient to support the sentence of death. This appeal followed.

Some time between 5:00 a.m. and 6:00 a.m. on Saturday, June 21, 1980, O'Jim's Restaurant in Eutaw, Alabama was robbed by appellant and a female companion, Jeanette Kennedy. After Kennedy left the restaurant, appellant pulled a pistol on waitress Corethea Hitton and demanded "give me all your money." Ms. Hitton complied with the demand. Appellant and Kennedy speedily fled, and Ms. Hitton called the Eutaw Police.

About 35 miles from the scene of the robbery, appellant, who was driving the getaway vehicle, was spotted by Livingston University Police Officer Wayne Sudduth, who was assisting in the search for the suspects. Officer Sudduth was aware that the robbery had occurred and apparently had knowledge of the description of the getaway vehicle from a police radio broadcast.

Officer Sudduth informed Livingston Police Officer Raymond Burne that he was stopping the vehicle. Officer Sudduth, who was dressed in a blue uniform, was driving a marked police car.

With his flashing lights on, Officer Sudduth stopped the vehicle which contained

appellant and Kennedy. He approached the driver's side of the car and asked for appellant's driver's license. Appellant opened the car door and reached around as if to get his billfold. However, according to the testimony of witness Kennedy, rather than removing his billfold he grabbed a .38 caliber revolver and shot Officer Sudduth, killing him. The evidence indicated that Officer Sudduth did not have his service revolver drawn, as it was found in his holster with the safety strap in place.

After the shooting of Officer Sudduth, appellant and Kennedy sped away, only to wreck their vehicle on the western edge of Livingston. Both exited the car and walked up the road where they hid in some bushes until a truck driven by Mr. Johnny Mathews approached. Mathews saw appellant come from under a bridge and act as if he were injured. Mathews stated that appellant was yelling for help and he stopped his truck on the side of the road. When appellant came within close proximity of the truck, he pulled the revolver, pointed it at Mathew's face and demanded the keys to the truck. After a brief period of time, during which Sumter County Deputy Sheriff Ralph Rainey drove past appellant, Kennedy, and Mathews, appellant secured the keys and fled with Kennedy.

Deputy Rainey reported what he had seen to the Livingston Police Department and was informed that he had observed the restaurant robbery suspects. Deputy Rainey set a roadblock and while moving his patrol car to allow a vehicle to pass, appellant drove Mathew's truck past him. A high speed chase ensued involving several vehicles.

Another roadblock had been set by York city police officers about halfway between Livingston and York. As the truck approached, the officers at the roadblock began to fire at it. Immediately thereafter, the truck wrecked and overturned. Subsequently, Deputy Rainey saw appellant throw a gun out of the truck cab. Deputy Rainey immediately retrieved it. Appellant and Kennedy were taken into custody, transported to a local hospital for examination, and afterwards taken to Sumter County Jail.

Several issues are presented for review.

I

Appellant contends that the jury's exposure to the media coverage of the assassination attempt on the life of the President of the United States, which attempt occurred during the trial of the case, was prejudicial to appellant's due process and equal protection guarantees and his right to a fair trial. Appellant urges that the trial court erred to a reversal in denying the motion for a new trial on this ground.

[1] The issue, of course, is not whether the exposure to the media coverage improperly influenced any member of the jury, but whether it might have unduly affected any juror to act outside the evidence in arriving at a verdict. *Seekers v. State*, 35 Ala.App. 40, 44 So.2d 628 (1949).

[2] The guilt phase of the trial was begun on March 30, 1981, and was concluded March 31, 1981. The sentencing phase was held on the succeeding day, April 1, 1981. The presidential assassination attempt occurred on March 30, 1981, the first day of the trial.

At the conclusion of the sentencing phase and after the jury had returned its verdict, appellant requested a polling of the jury to determine whether the jurors had been permitted to watch television coverage of the assassination attempt or to read newspaper articles about it. The trial court denied the jury polling request but stated for the record that the jurors had seen the television reports.

Appellant relies heavily on *Seekers*, supra, in furtherance of his position. *Seekers* is readily distinguished from this case. In *Seekers*, the jury, during an overnight recess, attended a rather gory movie, there were a number of coincidental similarities between the plot of that movie and the evidence presented in the case the jury was then hearing. One of the affidavits in the motion for a new trial in *Seekers* alluded to the similarities as follows:

"... The portrayals of death and suffering in the picture were such that it would have been most difficult for the jurors not to associate the scenes in the show with the testimony in the case. The two trials in which the defendants were convicted in the show were quite vividly portrayed and the verdicts rendered against the defendants could hardly have failed to impress the minds of the jurors to the prejudice of the defendant."

In the case at bar, there are no indications of any similarities between matters in the news reports and any of the evidence being considered by the jury.

The news reports obviously contained no communication, information, opinion, or other discussion of any facet of appellant's trial which would tend to affect the ultimate decision in the instant case.

We cannot say that the jury's viewing television news reports of the attempted assassination of the President might have unduly influenced any member of the jury to act outside the scope of the evidence presented in this trial. Consequently, we find no error in the trial court's ruling in that regard.

II

[3] Appellant argued in his motion for a new trial that the State impermissibly used its peremptory strikes in an unconstitutional, racially biased manner to remove blacks from the venire.

Appellant is black and the victim was white. Appellant's jury consisted of seven blacks and five whites.

At the hearing on the motion for a new trial, appellant offered proof that the State used its peremptory strikes to remove twenty blacks, ranging in age from 21 to 64 years, from the venire. Appellant also identified the struck jury by name, race, and age. No evidence on this issue was offered by the State.

Appellant relies heavily on *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759, *reh. den.* 381 U.S. 921, 85 S.Ct. 1528, 14 L.Ed.2d 442 (1965). The thrust of appellant's objection appears to focus on the exclusion of "young blacks" from petit juries.

The record is void of any evidence of systematic striking of blacks or "young blacks" from petit juries or of a history of purposeful discrimination against a particular race. *Swain*, at 380 U.S. 221, at 85 S.Ct. 836, provided, "[W]e cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws." Therefore, we do not think appellant has carried the burden of proof which *Swain* requires.

Additionally, this court recently decided the peremptory challenge issue, contrary to appellant's argument, in *Allen v. State*, 414 So.2d 163 (Ala.Cr.App.1982).

The trial court's ruling on this issue was correct.

III

Appellant contends that he was unconstitutionally deprived of an impartial jury in that (a) two members of the venire were improperly excused for cause due to their opposition to capital punishment, and (b) two of the State's jury voir dire questions were improper. We do not agree.

Appellant urges that two of the prospective jurors, Daisy Belle Cannon and Sim McCamon, were improperly excused for cause by the trial court in violation of the standard set out in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776, *reh. den.* 393 U.S. 898, 89 S.Ct. 67, 21 L.Ed.2d 185 (1968).

As to prospective juror Cannon, the record reveals the following (R. 256-257):

"MR. WATKINS [Prosecutor]: Yes, sir. Ladies and Gentlemen, the Judge has already qualified you on capital punishment, but I would like to go into it a little bit further to make sure that we understand each other.

"This case that we are going to try is one of the cases enumerated in the statute that says that a person may receive death if you find him guilty of a certain offense; and, I want to know

if we all understand each other, that each of you are telling me individually, that if you believe beyond a reasonable doubt and to a moral certainty the necessary elements to return a verdict, which would mean that this person would be put to death by electrocution, that you would be able to do that? Is that what everybody is telling me? Is there anybody that would not be able to do that?

"PJ I don't believe I would.

"THE COURT: All right; would you please stand up and give your name, please ma'am?

"PJ CANNON: Daisy Cannon. And, I just don't believe I could send anyone to the electric chair.

"MR. WATKINS [Prosecutor]: Mrs. Cannon, are you telling the Court that no matter what the evidence is; that if you believe beyond a reasonable doubt and to a moral certainty that this person did it; that if we follow the statute to show that we can prove all the necessary elements, that you would not be able to vote guilty if it meant that he would be sent to death? •

"PJ CANNON: I don't think I would."

And as to prospective juror McCasson, the record shows (R. 279–280):

"THE COURT: In this case, the State of Alabama, if the defendant is found guilty of the charge in the indictment, has indicated they plan to ask for the death penalty if the defendant is found guilty beyond a reasonable doubt as charged. Now, is there anyone on the jury panel that has a fixed opinion against capital punishment? In other words, does anyone have a strong feeling, a fixed opinion, against capital punishment? If so, I would like to see a show of hands.

"Yes sir. Mr. McCasson. You have an opinion against capital punishment?

"PJ McCASSON: Yes, sir.

"THE COURT: And, you do not feel that you would be able to return a verdict sentencing someone to the electric chair if they were found guilty beyond a reasonable doubt and to a moral certainty of the crime of the charges; is that correct?

"PJ McCASSON: My opinion about it, I think it should be some other way without taking a life for a life.

"THE COURT: All right; I understand and I respect that, sir. I am just trying to ascertain each one of your opinions. So, it is your view that you have a fixed opinion against capital punishment?

"PJ McCASSON: Yes sir.

"THE COURT: No matter what the evidence would be in a case you would not be able to vote for capital punishment?

"PJ McCASSON: Yes, sir."

[4] We deem it emphatically clear from the record that both potential jurors were so opposed to capital punishment that they would not be able to vote for the death penalty no matter what the evidence showed. Prospective juror Cannon indicated that she would not be able to return a guilty verdict if it meant the imposition of the death penalty. Prospective juror McCasson indicated that he had a fixed opinion against capital punishment regardless of what the evidence might be. As we perceive *Witherspoon*, a challenge for cause is permitted in both instances. The court in *Witherspoon*, supra, n. 21, said:

"We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*. . . ." (Emphasis in original) . . .

We hold that the record shows that the two prospective jurors in question were properly excused for valid reasons.

Cite as 425 So.2d 1339 (Ala.Cr.App. 1982)

Appellant complains that two of the State's jury voir dire questions were tantamount to eliciting a promise from each prospective juror to impose the death penalty if appellant was found guilty. The State contends that, though possibly inartfully phrased, the questions were designed to determine whether any venire member's opposition to capital punishment was such that it would prevent him or her from returning a guilty verdict in the face of adequate proof of the necessary elements of the offense.

The first question to which appellant takes exception is the voir dire question to which prospective juror Cannon responded, hereinabove discussed.

The question essentially is: Are each of you telling me that if you believe beyond a reasonable doubt and to a moral certainty that *the necessary elements* have been proven, you would return a verdict which would put this person to death by electrocution?

[5] It is obvious the question relates to the guilt stage verdict because it refers to "the necessary elements" in its text. Certainly, prospective juror Cannon interpreted the question as relating to the guilt phase because of the manner in which she responded. The trial court, in a follow-up question referred to "the necessary elements," thus indicating reference to the guilt phase of the trial. Additionally, when the question is viewed in context with the entire voir dire on this matter, the phrase "would be able" refers to the ability to keep an open mind on the subject, as opposed to having a fixed opinion which would require an acquittal, regardless of the evidence, in order to avoid the death penalty. *Witherspoon*, supra.

Appellant's counsel did not take exception to the question at the time, nor did he seek to determine, through clarifying questions, how the venire may have interpreted the question. We note, however, that counsel was permitted to and did examine the venire members extensively, including determination of religious preferences and political affiliations.

The remaining voir dire question appears as follows (R. 280–281):

"MR. WATKINS [Prosecutor]: Ladies and Gentlemen, the Judge has already told you that this is a case wherein there may be a verdict of death by electrocution; and, all of you have said that you believe in capital punishment, except for this one gentleman. Now, I want you to search your conscience and let's really talk about this thing before we go too far. It is my understanding from you that we all understand that the State has the burden of proving to you beyond a reasonable doubt and to a moral certainty, that this man is guilty as charged. I'm asking you to go one step further in assuming that the State of Alabama proves to you beyond a reasonable doubt and to a moral certainty that this man is guilty of the capital offense as charged, will all of you promise to me that you will be about [sic; able?] to return a verdict that will place him in the electric chair and cause his death? Everybody, search your conscience now and answer it honestly because that's all we want to know is what you are thinking and how you feel. Would each of you tell me that if I prove to you, the State proves to you, beyond a reasonable doubt and to a moral certainty that this man is guilty as charged of a capital offense, that you *will be* able to vote for the death penalty?—

(No Response.)

"MR. WATKINS [Prosecutor]: I take it by your silence that you all will.

"Thank you. That's all." (Emphasis added.)

Appellant objected to the manner in which the question was framed, pointing out that silence was an affirmative response which would preclude a guilty verdict on a lesser included offense. Appellant moved for a mistrial, which the trial court denied.

While the framing of the question and its lack of clarity is subject to criticism, we

find that the inquiry was not a solicitation of a promise to return a capital punishment verdict. When considered in context, this question again sought a determination of whether any venire member would be unable to vote for the death penalty due to a fixed opinion on the issue of capital punishment. As above, we perceive that this inquiry is well within the framework set out in *Witherspoon*, supra. Again, it is noted that appellant's objection went only to the form of the question. No attempt was made by appellant to clarify the intended purpose of the question in his voir dire examination. This adds credence to the theory that the interpretation of the purpose of the question at the time by appellant significantly differs from the argument he presently advances.

The trial court's denial of the motion for a mistrial does not constitute error.

IV

[6] Appellant argues that the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. He concedes that the prevailing view is that the death penalty is not per se cruel and unusual punishment, but urges that the application of it in this case is constitutionally prohibited. We disagree with this contention.

We have reviewed this case in detail in keeping with our Supreme Court's mandate in *Beck v. State*, 396 So.2d 645 (Ala.1980), which is as follows:

> "To insure that sentences of death will not be arbitrarily and capriciously imposed, we hold that both the Court of Criminal Appeals and this Court should examine all death sentences in light of the standards and procedure approved in *Gregg* [*Gregg v. Ga.*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)]. Each death sentence should be reviewed to ascertain whether the crime was in fact one properly punishable by death, whether similar crimes throughout the state are being punished capitally and whether the sentence of death is appropriate in relation to the particular defendant. In making this final determination, the courts should examine the penalty imposed upon the defendant in relation to that imposed upon his accomplices, if any."

The offense with which appellant was charged and convicted is unquestionably a capital offense under the provisions of § 13A-5-31(a)(5), Code 1975. We find that the evidence was sufficient to meet the degree of proof required to sustain a conviction under that code section.

In reviewing the death sentence determined by the jury, the trial court found two aggravating circumstances:

1. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.
2. The capital felony was committed while the defendant was engaged in flight after committing a robbery.

Appellant contends that the first aggravating circumstance essentially duplicates the offense charged in the indictment and, therefore, may not be considered an aggravating circumstance in this case, citing *Keller v. State*, 380 So.2d 926 (Ala.Crim.App. 1979), *cert. denied*, 380 So.2d 938 (Ala.1980). The rule in *Keller*, to the effect that the aggravating circumstance charged in the indictment cannot be used as both the criminal charge and the circumstance aggravating that charge, has been tacitly overruled in *Kyser v. State*, 399 So.2d 330 (Ala.1981), and *Beck*, supra.

However, in the case before us, the enumerated aggravating circumstance of avoiding or preventing a lawful arrest is not an integral element of the basic aggravating circumstance alleged in the indictment. Therefore, the rule in *Keller*, even if it were still intact, would have no application here.

[7] As to the remaining aggravating circumstance enumerated in the trial court's order, appellant contends the State failed to prove he was in fact in flight after committing a robbery.

The appellant testified at the sentencing hearing before the trial judge; he did not

testify before the jury at either the guilt phase or sentencing phase of the trial. At the sentencing hearing, he admitted having committed the robbery of O'Jim's Restaurant, driving the car from the robbery scene and being stopped by an officer in a police car approximately 30 miles from the robbery scene. He testified that he was exceeding the speed limit at the time, and that he was not sure why he was being stopped by the officer. Other evidence indicated the victim stopped appellant within approximately 30 minutes of the robbery. Appellant further testified that he did not shoot the police officer, but that it was Jeanette Kennedy, his girlfriend and companion, who did the shooting. Kennedy testified during the guilt phase of the trial that appellant robbed O'Jim's Restaurant and that he drove from the scene "real fast." Kennedy further testified that appellant shot the police officer immediately after the police officer approached the driver's side of the car and asked to see appellant's driver's license.

We find that the evidence is sufficient to justify beyond a reasonable doubt the trial court's findings regarding the "in flight after committing a robbery" aggravating circumstance.

The remaining considerations are whether similar crimes throughout the state are being punished capitally, and whether the sentence of death is appropriate in relation to this particular defendant (appellant). We answer both questions in the affirmative.

[8] The death penalty is appropriate punishment for the murder of a police officer, as in this case. The death penalty has been consistently applied in similar cases. The death penalty was imposed by the Geneva County Circuit Court for the murder of a sheriff in *Cade v. State*, 375 So.2d 802 (Ala.Cr.App.), *aff'd.*, 375 So.2d 828 (Ala. 1979), *vacated and remanded on other grounds*, 448 U.S. 903, 100 S.Ct. 3043, 65 L.Ed.2d 1133 (1980), *rev'd. on other grounds*, 405 So.2d 699 (Ala.1981). Also, the death penalty was imposed by the Coffee County Circuit Court for the murder of a sheriff in *Magwood v. State*, 426 So.2d 918 (Ala.Cr.App.1982). See also *Daniel v. State* [Ms. 4 Div. 987, April 20, 1982], —— So.2d —— (Ala.Cr.App.1982).

[9] Appellant argues that Jeanette Kennedy, appellant's girlfriend and companion, was an accomplice and that her sentence of 20 years (on her guilty plea) is so substantially out of line with appellant's death sentence as to require reversal under the provisions of *Beck*. We do not agree with appellant's position. Appellant argues in brief that it was Kennedy, not appellant, who "gunned down Officer Sudduth," and that she got only 20 years for the murder of a police officer. The jury and trial court judge heard the testimony and cross-examination of Kennedy and were in a position to observe her demeanor and form conclusions as to her credibility; the trial court judge heard the testimony of appellant (at the sentencing hearing) and he was in the best position to judge appellant's credibility. From the conclusions reached by the jury and the trial court judge, which we find to be adequately substantiated by the evidence, appellant shot the police officer. The jury and trial court judge were well within their prerogatives in so finding. It is noted from the testimony that it was appellant who initially procured the gun, who pulled the gun in the restaurant robbery, who had the gun during the taking of a pickup truck after he wrecked his vehicle, and who threw the gun out of the wrecked pickup truck after it was wrecked. In summary, all of the factors in this case considered, appellant's death sentence is not excessive when compared to the 20-year sentence received by his girlfriend and companion, Jeanette Kennedy.

As to the mitigating circumstances, the "Order of Court Sentencing Defendant to Death" [1] states:

"The court finds that the following mitigating circumstance enumerated in Section 13-11-7, Code of Alabama 1975, was

1. The trial judge's order setting the penalty is hereby attached as Appendix A.

present but insufficient to outweigh the aggravating circumstances:

"The Defendant has no significant history of prior criminal activity."

The appellant contends that the above order reveals that the trial court considered only the statutory mitigating circumstances, to the exclusion of any nonstatutory mitigating circumstances, in violation of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and *Beck*, supra. Further, appellant contends that the evidence of nonstatutory mitigating circumstances was not weighed by the jury or the trial court.

Beck provides that the trial court must permit a defendant to introduce any matter relating to mitigating circumstances at the sentencing phase of the trial. *Lockett* declared unconstitutional an Ohio statute which precluded the sentencing judge from considering non-statutory mitigating factors, such as character, age, lack of specific intent to cause death, etc.

The trial court allowed appellant to present testimony at the jury sentencing hearing from several friends and relatives concerning appellant's background, life, and character. The jury sentencing hearing was held on April 1, 1981, the day after conclusion of the guilt phase trial.

[10] In his instructions to the jury, the trial judge outlined the statutory mitigating circumstances, and further instructed the jury:

"So those are the mitigating circumstances that the law of Alabama provides. In addition to mitigating circumstances that I just read to you, you may also consider as a mitigating circumstance any aspect of the defendant's character, his life, and any of the circumstances of the capital offense which tend to indicate that the defendant should not be sentenced to death. Mitigating circumstance does not have to be included on the list that I have read to you in order for you to consider it. Mitigating circumstances considered by you should be based on the evidence that you have heard. And if you are satisfied from the evidence presented during the guilt stage of the trial or during the sentencing hearing, that a mitigating circumstance exists in this case then you should consider it. Mitigating circumstance need not be proven to you—need merely be proven to your satisfaction. It does not have to be proven beyond a reasonable doubt for you to consider it. Only an aggravating circumstance has to be proven beyond a reasonable doubt and that burden is on the State."

The record is void of any reasons to suspect that the jury either disregarded the testimony of appellant's witnesses, or ignored the trial court's instructions.

A crucial assumption underlying the jury system is that juries will follow the instructions given them by the trial judge. *Parker v. Randolph*, 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979). This leads to the inescapable conclusion that the jury, acting within the bounds of its prerogative, unanimously found that the aggravating circumstances outweighed the statutory and nonstatutory mitigating circumstances.

[11] The failure of the trial judge to specifically refer to the non-statutory mitigating factors does not evidence his failure or refusal to consider them in the sentencing of appellant. The trial court's failure to specifically mention non-statutory mitigating circumstances may be interpreted merely as a conclusion on the judge's part that non-statutory mitigating circumstances were insufficient to outweigh the aggravating circumstances. The trial judge had previously presided over the guilt phase of the trial and the jury sentencing hearing; during the latter hearing he had instructed the jury that they "may consider as a mitigating circumstance any aspect of the defendant's character, his life, and any of the circumstances of the capital offense which tend to indicate that the defendant should not be sentenced to death," and admitted evidence of the same for the jury's and his consideration. Clearly, there is nothing in the record to indicate that the judge or jury failed to consider all evidence of any possi-

ble mitigating circumstances presented to them.

For these reasons, we reject appellant's contentions regarding non-statutory mitigating circumstances.

V

[12] Appellant attacks the validity of the indictment under which he was tried as being insufficient as a matter of law and as being totally and fatally defective. A motion to dismiss and/or demurrer to the indictment, which was overruled, raised these grounds prior to arraignment. Appellant urges that a capital offense indictment must allege the aggravating circumstances relied on to elevate a non-capital offense to a capital offense, citing § 13A-5-31(a), Code 1975.

The charging part of the indictment is as follows:

"Percy Leo Dobard . . . did, unlawfully and with malice aforethought intentionally cause the death of another person, Carlton Wayne Sudduth, by shooting him with a pistol; while the said Carlton Wayne Sudduth was a police officer on duty as a Livingston University Security Police Officer under the provisions of Title 16-53-12, Code of Alabama, 1975 in violation of 13A-5-31 of the Code of Alabama against the peace and dignity of the State of Alabama."

Section 13A-5-31(a), Code 1975, provides:

"(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

"(1) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant;

"(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

"(3) Rape when the victim is intentionally killed by the defendant; carnal knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant;

"(4) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant;

"(5) The murder of any police officer, sheriff, deputy, state trooper or peace officer of an, kind, or prison or jail guard while such prison or jail guard is on duty or because of some official or job-related act or performance of such officer or guard;

"(6) Any murder committed while the defendant is under sentence of life imprisonment;

"(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to contract or for hire;

"(8) Indecent molestation of, or an attempt to indecently molest, a child under the age of 16 years, when the child victim is intentionally killed by the defendant;

"(9) Willful setting off or exploding dynamite or other explosive under circumstances now punishable by sections 13A-7-21 through 13A-7-23 or 13A-7-41 through 13A-7-43, when a person is intentionally killed by the defendant because of said explosion;

"(10) Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts;

"(11) Murder in the first degree where the victim is a public official or public figure and the murder stems from or is caused by or related to his official position, acts or capacity;

"(12) Murder in the first degree committed while the defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to

obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

"(13) Any murder committed by a defendant who has been convicted of murder in the first or second degree in the 20 years preceding the crime; or

"(14) Murder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness."

Also germane to the issue here presented is § 13A-5-35, Code 1975, which provides: "Aggravating circumstances shall be the following:

"(1) The capital felony was committed by a person under sentence of imprisonment;

"(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

"(3) The defendant knowingly created a great risk of death to many persons;

"(4) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping for ransom;

"(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

"(6) The capital felony was committed for pecuniary gain;

"(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

"(8) The capital felony was especially heinous, atrocious or cruel. (Acts 1975, No. 213, § 6; Code 1975, § 13-11-6.)"

The thrust of appellant's position is that "aggravation is such a necessary and elementary part of the Death Penalty Act that the defect of failing to accuse a defendant of aggravation in an indictment which also accuses him of one of the offenses enumerated in Title 13A, Section 13-5-31, Code, renders such an indictment void." We do not agree.

Substantial confusion has been caused by the two separate but related concepts of "aggravation" and "aggravating circumstances" contained in the 1975 Act. However, we are convinced that the § 13A-5-35 aggravating circumstances need not be averred in the indictment.

Section 13A-5-31 contains the definitional aggravation required to elevate a non-capital offense. *Beck*, supra; *Kyzer*, supra. In the present case, the non-capital offense of murder of an individual was elevated to a capital offense because the individual was intentionally killed while he was a police officer on duty. This analogy is in keeping with the holding in *Kyzer*, supra, at 338, as follows:

> "If a defendant is convicted of 'murder in the first degree wherein two or more human beings are intentionally killed,' and if the jury, after a hearing conducted in accordance with the principles set out in *Beck*, fixes that penalty at death, the trial judge, if convinced that the 'aggravation' averred in the indictment 'that two or more human beings were intentionally killed by the defendant by one or a series of acts' outweighs the mitigating circumstances, may impose a sentence of death by setting forth in writing, as required by § 13-11-4, his findings, even though the 'aggravating circumstance' is not 'enumerated in § 13-11-6.' The jury could make the same finding at its sentence hearing mandated by *Beck*."

In the present case, the aggravation averred in the indictment is found in the phrase "while the said Carlton Wayne Seddoth was a police officer on duty." The aggravating circumstances enumerated in § 13A-5-35 are relevant only to the issue

of whether a defendant should be given the death penalty after having been convicted of a capital offense described in § 13A-5-31. Consequently, we find no error in the trial court's overruling of appellant's motion to dismiss and/or demurrer to the indictment.

VI

Lastly, appellant contends that the State, in its closing argument to the jury in the guilt phase of the trial, impermissibly commented on his failure to testify. Appellant made no objection to the questioned comment and, thus, the possible need for curative instructions was not called to the trial court's attention.

The State urges that the failure of appellant to interpose a timely objection constituted a waiver, which does not preserve the matter for review by the court. We disagree, because the "plain error" rule applies and we are obligated to search the record for prejudicial error.

[13] The portion of the State's closing argument of which appellant complains is (R. 563):

"There is no evidence before you that could give you any reason why you could think that Jeanette Kennedy shot Office [sic] Sudduth as opposed to Mr. Dobard. The evidence is very clear. As far as I can see, and it is undisputed, that Percy Dobard shot and killed Officer Wayne Sudduth."

[14] Where there has been a direct comment by the State on the defendant's failure to testify, and the trial court has not acted promptly to cure such improper comment, there is no question that a conviction must be reversed because it violates constitutional rights. However, indirect references to the defendant's failure to testify present questions more difficult to resolve. While an accused's constitutional guarantees must be preserved inviolate, the State's prerogative to fairly comment on the evidence should not be unduly restricted.

The testimony of witness Kennedy was to the effect that appellant reached to get his driver's license and, instead, drew his gun and fired the fatal shots. Upon the conclusion of the State's case, appellant rested without offering any evidence. Our search of the record fails to disclose any evidence disputing witness Kennedy's testimony that appellant shot and killed Officer Wayne Sudduth.

[15] Where the State's evidence does stand uncontradicted, the prosecutor does have a right to point this out to the jury. *Beecher v. State*, 294 Ala. 674, 320 So.2d 727 (1975). Does the manner in which it was pointed out rise to the level of being an indirect comment on the defendant's failure to testify? We think not.

It is undisputed that the only people who could testify to the events surrounding the shooting of Officer Sudduth were appellant and witness Kennedy. We perceive, however, that Kennedy may have testified in appellant's defense, or may have lessened the harshness of her testimony to appellant's benefit had appellant called her as his witness. At the time of appellant's trial Kennedy had pleaded guilty to "these crimes" and had been sentenced to 20 years in the penitentiary. Since she had already been sentenced at the time of her testimony, it could hardly be said that she was a captive witness for the State. There was nothing which could have prevented appellant from calling Kennedy as his witness in an effort to have her testify to the "truth" as he remembered the facts.

Physical evidence such as the paths of the bullets and the relative physical positions of appellant and witness Kennedy at the instant of the shooting may have provided proof disputing to some extent the State's evidence.

We hold that the State's closing argument comment could not have been understood by the jury as a reference to the failure of appellant to testify, and was not, therefore, violative of appellant's constitutional right against self-incrimination.

This case is distinguishable from *Beecher*, supra, in that the comment in *Beecher* was: "No one took the stand to deny it"; and in

this case the comment was: "As far as I can see, and it is undisputed, that Percy Dobard shot and killed Officer Wayne Sudduth," It is obvious from the comparison that in *Beecher* the comment directly called attention to lack of testimony from "the stand," whereas in the case before us no reference was made to lack of testimony.

The State's comment in this case is properly within the virtual identification doctrine, which was quoted with approval by our Supreme Court in *Ex parte Yarber*, 375 So.2d 1231 (Ala.1979), at page 1234, as follows:

> "This doctrine requires that any covert statement be construed against the defendant. 'In other words, no matter what the jury might infer, there must virtually be a direct identification of the defendant alone as the individual who has not become a witness.' *King v. State*, 45 Ala.App. 348, 352, 230 So.2d 538, 541 (1970)."

We hold that the State's comment is not violative of the limitation placed upon comments dealing with the "uncontradicted," "undisputed," or "undenied" nature of the State's evidence, and does not run afoul of the doctrine expressed in *Yarber*, supra.

We conclude, therefore, that the State's closing comments in this case did not violate appellant's constitutional rights.

We have searched the record for error, as required by law, and have found no error harmful to the substantial rights of appellant. The judgment of the circuit court is affirmed.

AFFIRMED.

All the Judges concur.

APPENDIX A

STATE OF ALABAMA, Plaintiff	*	IN THE CIRCUIT COURT OF
Vs.	*	MARENGO COUNTY, ALABAMA
PERCY LEO DOBARD, Defendant	*	CASE NUMBER CC-81-058

ORDER OF COURT SENTENCING DEFENDANT TO DEATH

This being the day set for the sentence hearing required by Section 13-11-3, Code of Alabama 1975, concerning the issue of whether or not the Court will sentence the Defendant to death or life imprisonment without parole; and the Defendant, his Attorney and the District Attorney were present in Court, and the Court after hearing the relevant evidence relating to aggravating or mitigating circumstances enumerated in Sections 13-11-6 and 13-11-7, Code of Alabama 1975, is of the opinion that the punishment of death previously fixed by the jury should be imposed on the Defendant.

The Court finds that the following aggravating circumstances enumerated in Section 13-11-6, Code of Alabama 1975, were present in this case, and these circumstances are sufficient to support the sentence of death:

1) The capital felony was committed while the Defendant was engaged in flight after committing a robbery.

2) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

The Court finds that the following mitigating circumstance enumerated in Section 13-11-7, Code of Alabama 1975, was present but insufficient to outweigh the aggravating circumstances:

The Defendant has no significant history of prior criminal activity.

The Court further finds that the Defendant was the person who intentionally fired the shot that killed the victim. The Court finds that none of the other enumerated mitigating circumstances were present in this case.

It is, therefore, the judgment and opinion of the Court that it is now proper to pronounce judgment and sentence the Defend-

APPENDIX A—Continued

ant to death. The Defendant, after being asked if he has anything further to say why sentence of law should not be now imposed upon him, says nothing.

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that the Defendant, Percy Leo Dobard, is sentenced to death by electrocution as provided by the laws of the State of Alabama. The execution of the sentence of death is suspended, pending the automatic appeal required by law. It is further ORDERED that David Reid, Livingston, Alabama, is appointed to represent the Defendant on appeal and an appeal to the Court of Criminal Appeals of Alabama is entered as required by law.

It is further ORDERED that the Defendant, Percy Leo Dobard, remain in custody during the pendency of the appeal, and that the Sheriff of Sumter County, Alabama, forthwith transport the Defendant to the William C. Holman unit of the prison system and deliver him to the custody of the Warden of William C. Holman unit of the prison system at Atmore, Alabama.

All DONE and ORDERED this, the 13th day of April, 1981.

/s/ Claud D. Neilson
CLAUD D. NEILSON
CIRCUIT JUDGE

Ex parte Percy Leo DOBARD.

(Re: Percy Leo Dobard

v.

State of Alabama).

81-899.

Supreme Court of Alabama.

July 8, [illegible]3.

Rehearing Denied Aug. 5, 1983.

Defendant was convicted in the Circuit Court, Marengo County, Claud D. Neilson, J., of murder of a police officer while on duty, and he appealed. The Court of Criminal Appeals, 435 So.2d 1338, affirmed. The Supreme Court, Embry, J., held that: (1) there was no showing that "young blacks" were excluded from jury; (2) two jurors who expressed unequivocal opposition to death penalty were properly removed for cause; (3) defendant was not deprived of right to fair trial by news media coverage of assassination attempt on President Reagan which occurred during trial; (4) prosecutor did not impermissibly comment on defendant's exercise of his right to remain silent; and (5) imposition of death penalty was not disproportionate.

Affirmed.

1. Criminal Law ⇐855(8)

Jury's exposure to media coverage of assassination attempt on life of president of the United States, which occurred during defendant's capital murder trial, did not deprive defendant of his right to a fair trial.

2. Jury ⇐33(5.1)

Record did not support defendant's contention that state used peremptory strikes in an unconstitutional manner by systematically excluding young blacks from the jury, which was composed of seven blacks and five whites.

3. Jury ⇐108

No venireman may be removed for cause unless it is determined that his views as to capital punishment are so strong that he would automatically refuse to impose the death sentence regardless of the evidence produced.

4. Jury ⇐108

Prospective juror who indicated that she would not be able to return a guilty verdict if if meant the imposition of the death penalty and prospective juror who indicated that he had a fixed opinion against capital punishment regardless of

APPENDIX C

EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FOURTEENTH AMENDMENT

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX D

§ 13A-5-53. Appellate review of death sentence; scope; remand; specific determinations to be made by court; authority of court following review.

(a) In any case in which the death penalty is imposed, in addition to reviewing the case for any error involving the conviction, the Alabama court of criminal appeals, subject to review by the Alabama supreme court, shall also review the propriety of the death sentence. This review shall include the determination of whether any error adversely affecting the rights of the defendant was made in the sentence proceedings, whether the trial court's findings concerning the aggravating and mitigating circumstances were supported by the evidence, and whether death was the proper sentence in the case. If the court determines that an error adversely affecting the rights of the defendant was made in the sentence proceedings or that one or more of the trial court's findings concerning aggravating and mitigating circumstances were not supported by the evidence, it shall remand the case for new proceedings to the extent necessary to correct the error or errors. If the appellate court finds that no error adversely affecting the rights of the defendant was made in the sentence proceedings and that the trial court's findings concerning aggravating and mitigating circumstances were supported by the evidence, it shall proceed to review the propriety of the decision that death was the proper sentence.

(b) In determining whether death was the proper sentence in the case the Alabama court of criminal appeals, subject to review by the Alabama supreme court, shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death was the proper sentence; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(c) The court of criminal appeals shall explicitly address each of the three questions specified in subsection (b) of this section in every case it reviews in which a sentence of death has been imposed.

(d) After performing the review specified in this section, the Alabama court of criminal appeals, subject to review by the Alabama supreme court, shall be authorized to:

(1) Affirm the sentence of death;

(2) Set the sentence of death aside and remand to the trial court for correction of any errors occurring during the sentence proceedings and for imposition of the appropriate penalty after any new sentence proceedings that are necessary, provided that such errors shall not affect the determination of guilt and shall not preclude the imposition of a sentence of death where it is determined to be proper after any new sentence proceedings that are deemed necessary; or

(3) In cases in which the death penalty is deemed inappropriate under subdivision (b)(2) or (b)(3) of this section, set the sentence of death aside and remand to the trial court with directions that the defendant be sentenced to life imprisonment without parole. (Acts 1981, No. 81-178, § 15.)

Collateral references. — 24 C.J.S., Criminal Law, §§ 1643-1647, 1831-1840.
5 Am. Jur. 2d, Appeal and Error, § 723.

§ 13A-5-54. Appointment of experienced counsel for indigent defendants.

Each person indicted for an offense punishable under the provisions of this article who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years' prior experience in the active practice of criminal law. (Acts 1981, No. 81-178, § 16.)

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-37 are included in the annotations for this section.

This section does not require the record to show that appointed counsel has at least five years' prior experience in the active practice of criminal law; it simply requires that the indigent accused be provided such counsel. Absent some tangible indication that the requirements were not met, a court cannot summarily rule, as a matter of law, that the statute was not complied with. Johnson v. State, 399 So. 2d 859 (Ala. Crim. App. 1979), aff'd in part and rev'd in part, 399 So. 2d 873 (Ala. 1981).

Appointment in keeping with section. — Where an attorney has practiced criminal law at the call of the criminal docket in the county for 10 years, his appointment to a case involving a capital felony is in keeping with the provision of this section requiring not less than five years prior experience in the active practice of criminal law. Jacobs v. State, 371 So. 2d 429 (Ala. Crim. App. 1977), rev'd on other grounds, 371 So. 2d 448 (Ala. 1979).

Collateral references. — 23 C.J.S., Criminal Law, § 979(1).
21 Am. Jur. 2d, Criminal Law, §§ 309-317.
Accused's right to represent himself in state criminal proceeding — modern state cases, 98 ALR3d 13.

§ 13A-5-55. Conviction and sentence of death subject to automatic review.

In all cases in which a defendant is sentenced to death, the judgment of conviction shall be subject to automatic review. The sentence of death shall be subject to review as provided in section 13A-5-53. (Acts 1981, No. 81-178, § 17.)

Editor's note. — In light of the similarity of the provisions, decisions under former § 13A-5-34 are included in the annotations for this section.

The whole purpose of §§ 13A-5-33 through 13A-5-36 (now repealed) was to allow for judicial review of a sentence of death fixed by the jury. Kyzer v. State, 399 So. 2d 330 (Ala. 1981).

Scope of review. — Each death sentence should be reviewed to ascertain whether the crime was in fact one properly punishable by death, whether similar crimes throughout the state are being punished capitally and whether the sentence of death is appropriate in relation to the particular defendant. In making this final determination, the courts should examine the penalty imposed upon the defendant in relation to that imposed upon his accomplices, if any. Beck v. State, 396 So. 2d 645 (Ala. 1980).

Collateral references. — 24 C.J.S., Criminal Law, §§ 1643-1647, 1831-1840.
5 Am. Jur. 2d, Appeal and Error, § 723.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

Supreme Court, U.S.
FILED
DEC 7 1983
ALEXANDER L. STEVAS
CLERK

PERCY LEO DOBARD,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI

TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

CHARLES A. GRADDICK
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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court grant certiorari to review questions that were neither presented to nor reviewed by the state appellate courts below?

2. Should this Court grant certiorari to determine whether the standards it promulgated in Witherspoon v. Illinois, 391 U.S. 510 (1968), were properly applied in a single case, a question which is certain to be decided in a 28 U.S.C. §2254 proceeding involving the case if this Court denies certiorari?

3. Should this Court grant certiorari to determine whether a state supreme court misapplied state law precedents, violated state constitutional principles, and engaged in analysis forbidden by state law?

PARTIES

The caption contains the names of all the parties.

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OPINIONS BELOW

The statement of the opinions below contained in the certiorari petition is correct.

JURISDICTION

The decision of the Alabama Supreme Court affirming petitioner's conviction and sentence occurred on July 8, 1983, and rehearing was denied on August 5, 1983. Justice Powell extended the time for filing a certiorari petition to November 3, 1983.

This Court has jurisdiction under 28 U.S.C. §1257(3) to review the second question raised in the certiorari petition, the one involving application of Witherspoon v. Illinois, 391 U.S. 510 (1968). However, this Court does not have jurisdiction to review the other questions raised in the certiorari petition, because they were neither presented to nor decided by the state appellate courts below.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The statement of constitutional and statutory provisions involved which is contained in the certiorari petition is correct.

STATEMENT OF THE CASE

The facts of the crime, as found by the Alabama Court of Criminal Appeals, are as follows:

> Some time between 5:00 a.m. and 6:00 a.m. on Saturday, June 21, 1980, O'Jim's Restaurant in Eutaw, Alabama was robbed by appellant and a female companion, Jeanette Kennedy. After Kennedy left the restaurant, appellant pulled a pistol on waitress Corethea Hitton and demanded "give me all your money." Ms. Hitton complied with the demand. Appellant and Kennedy speedily fled, and Ms. Hitton called the Eutaw Police.
>
> About 35 miles from the scene of the robbery, appellant, who was driving the getaway vehicle, was spotted by Livingston University Police Officer Wayne Sudduth, who was assisting in the search for the suspects. Officer Sudduth was aware that the robbery had occurred and apparently had knowledge of the description of the getaway vehicle from a police radio broadcast.
>
> Officer Sudduth informed Livingston Police Officer Raymond Burne that he was stopping the vehicle. Officer Sudduth, who was dressed in a blue uniform, was driving a marked police car.
>
> With his flashing lights on, Officer Sudduth stopped the vehicle which contained appellant and Kennedy. He approached the driver's side of the car and asked for appellant's driver's license. Appellant opened the car door and reached around as if to get his billfold. However, according to the testimony of witness Kennedy, rather than removing his billfold he grabbed a .38 caliber revolver and shot Officer Sudduth, killing him. The evidence indicated that Officer Sudduth did not have his service revolver drawn, as it was found in his holster with the safety strap in place.
>
> After the shooting of Officer Sudduth, appellant and Kennedy sped away, only to wreck their vehicle on the western edge of Livingston. Both exited the car and walked up the road where they hid in some bushes until a truck driven by Mr. Johnny Mathews approached. Mathews saw appellant come from under a bridge and act as if he were injured. Mathews stated that appellant was yelling for help and he stopped his truck on the side of the road. When appellant came within close proximity of the truck, he pulled the revolver, pointed it at Mathew's face and demanded the keys to the truck.

> After a brief period of time, during which Sumter County Deputy Sheriff Ralph Rainey drove past appellant, Kennedy, and Mathews, appellant secured the keys and fled with Kennedy.
>
> Deputy Rainey reported what he had seen to the Livingston Police Department and was informed that he had observed the restaurant robbery suspects. Deputy Rainey set a roadblock and while moving his patrol car to allow a vehicle to pass, appellant drove Mathew's truck past him. A high speed chase ensued involving several vehicles.
>
> Another roadblock had been set by York city police officers about halfway between Livingston and York. As the truck approached, the officers at the roadblock began to fire at it. Immediately thereafter, the truck wrecked and overturned. Subsequently, Deputy Rainey saw appellant throw a gun out of the truck cab. Deputy Rainey immediately retrieved it. Appellant and Kennedy were taken into custody, transported to a local hospital for examination, and afterwards taken to Sumter County Jail.

Dobard v. State, 435 So.2d 1338, 1339-1340 (Ala. Cr. App. 1982). The Alabama Supreme Court expressly adopted those factfindings, Ex parte Dobard, 435 So.2d 1351, 1353-1354, and added its own factfinding that:

> Overwhelming evidence of record shows that Dobard pulled the trigger, firing the shots that killed Officer Sudduth. ...

Id., at 1357.

Petitioner was indicted for and convicted of the Code of Alabama, 1975, §13A-5-31(a)(5) capital offense of murdering a police officer while the officer was on duty. Dobard v. State, 435 So.2d at 1339. After a separate sentence hearing, the jury returned a verdict fixing petitioner's sentence at death. Id. Following another sentence proceeding before the trial court judge, the trial court sentenced petitioner to death. Id.

Petitioner's conviction and sentence were affirmed by the Alabama Court of Criminal Appeals, Dobard v. State, 435 So.2d 1338 (Ala. Cr. App. 1982), and by the Alabama Supreme Court, Ex parte Dobard, 435 So.2d 1351 (Ala. 1983).

The question involving application of Witherspoon v. Illinois, 391 U.S. 510 (1968), which is raised in the certiorari petition, Pet. at 13-21, was presented to and addressed by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. Dobard v. State, 435 So.2d 1338, 1341-1342 (Ala. Cr. App. 1982), aff'd, 435 So.2d 1351, 1355 (Ala. 1983). Neither of the other two questions raised in the certiorari petition, Pet. at 10-13 and 21-26, were presented to or addressed by either the Alabama Court of Criminal Appeals or the Alabama Supreme Court.

SUMMARY OF ARGUMENT

The nationwide proportionality review issue raised in the certiorari petition was neither raised in nor decided by the Alabama Court of Criminal Appeals or the Alabama Supreme Court. The issue of whether due process principles required the trial court to conduct a hearing into jury exposure to media coverage of the attempted assassination of the President raised or decided below, either. Therefore, this Court should not grant certiorari to review those issues, and indeed it has no jurisdiction to do so.

The issue of whether the standards promulgated by this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968), were misapplied to a prospective juror in this case was raised in the state appellate courts below. However, that issue is not one worthy of this Court's scarce certiorari resources, particularly since it will be reviewed and decided in the 28 U.S.C. §2254 proceeding which will inevitably follow a denial of certiorari by this Court.

ARGUMENT

I. THE NATIONWIDE PROPORTIONALITY ISSUE WAS NEITHER RAISED IN NOR DECIDED BY THE COURTS BELOW

Alabama appellate courts conduct proportionality review of death sentences. The scope of that review was outlined in Beck v. State, 396 So.2d 645 (Ala. 1980), in which the Alabama Supreme Court mandated:

> To insure that sentences of death will not be arbitrarily and capriciously imposed, we hold that both the Court of Criminal Appeals and this Court should examine all death sentences in light of the standards and procedure approved in Gregg. Each death sentence should be reviewed to ascertain whether the crime was in fact one properly punishable by death, whether similar crimes throughout the state are being punished capitally and whether the sentence of death is appropriate in relation to the particular defendant. In making this final determination, the courts should examine the penalty imposed upon the defendant in relation to that imposed upon his accomplices, if any.

Id., at 664.

In this case, the Alabama Court of Criminal Appeals conducted extensive review of the appopriateness of petitioner's sentence, Dobard v. State, 435 So.2d 1338, 1344-1347 (Ala. Cr. App. 1982), and during that review concluded that the death penalty "has been consistently applied in similar cases" in Alabama, id., at 1345. The Alabama Supreme Court reached the same conclusion. Ex parte Dobard, 435 So.2d 1351, 1357-1358 (Ala. 1983).

It is true, as petitioner asserts, that neither Alabama appellate court compared the sentence he received to the sentence received for similar crimes in any other state. However, petitioner did not ask either Alabama appellate court to conduct nationwide proprotionality review, nor did he raise the issue of whether that type of proportionality review was required before either appellate court. The issue of whether the Eighth or Fourteenth Amendment requires that

proportionality review of capital sentencing include consideration of similar cases arising in other states was raised by petitioner for the first time in the certiorari petition he has filed in this Court. Indeed, petitioner does not contend to the contrary. While he does say that he raised "the issue of proportionality on appeal," Pet. at 12, he does not and cannot say that he raised the nationwide proportionality issue he is asking this Court to consider. In any event, when a state appellate court fails to pass on a particular federal question, this Court has said it will presume that that failure was due to the want of proper presentation unless the petitioner can show to the contrary. Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974); Street v. New York, 394 U.S. 576, 582 (1969).

Because petitioner did not present the nationwide proportionality issue to the state appellate courts below and it was not decided by them, this Court need not decide it, Moore v. Illinois, 408 U.S. 786, 799 (1972); should not decide it, Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974); and has no jurisdiction to decide it, Street v. New York, 394 U.S. 576, 581-582 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945); see, 28 U.S.C. §1257(2) and (3).

II. THE WITHERSPOON ISSUE DOES NOT NOT PRESENT A COMPELLING CASE FOR EXERCISE OF THIS COURT'S SCARCE CERTIORARI RESOURCES

On pp. 14 - 18 of the petition, petitioner argues that prospective juror Cannon was excused in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968). In the Alabama Court of Criminal Appeals, petitioner contended that two prospective jurors, one of which was venireman Cannon, were excused contrary to Witherspoon. The appellate court answered that contention as follows:

> As to prospective juror Cannon, the record reveals the following (R. 256-257):

"MR. WATKINS [Prosecutor]: Yes, sir. Ladies and Gentlemen, the Judge has already qualified you on capital punishment, but I would like to go into it a little bit further to make sure that we understand each other.

"This case that we are going to try is one of the cases enumerated in the statute that says that a person may receive death if you find him guilty of a certain offense; and, I want to know if we all understand each other, that each of you are telling me individually, that if you believe beyond a reasonable doubt and to a moral certainty the necessary elements to return a verdict, which would mean that this person would be put to death by electrocution, that you would be able to do that? Is that what everybody is telling me? Is there anybody that would not be able to do that?

"PJ: I don't believe I would.

"THE COURT: All right; would you please stand up and give your name, please ma'am?

"PJ CANNON: Daisy Cannon. And, I just don't believe I could send anyone to the electric chair.

"MR. WATKINS [Prosecutor]: Mrs. Cannon, are you telling the Court that no matter what the evidence is; that if you believe beyond a reasonable doubt and to a moral certainty that this person did it; that if we follow the statute to show that we can prove all the necessary elements, that you would not be able to vote guilty if it meant that he would be sent to death?

"PJ CANNON: I don't think I would."

* * * *

We deem it emphatically clear from the record that both potential jurors were so opposed to capital punishment that they would not be able to vote for the death penalty no matter what the evidence showed. Prospective juror Cannon indicated that she would not be able to return a guilty verdict if it meant the imposition of the death penalty. Prospective juror McCasson indicated that he had a fixed opinion against capital punishment regardless of what the evidence might be. As we perceive Witherspoon, a challenge for cause is permitted in both instances. The court in Witherspoon, supra, n. 21, said:

> "We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. ..." (Emphasis in original)
>
> We hold that the record shows that the two prospective jurors in question were properly excused for valid reasons.

Dobard v. State, 435 So.2d 1338, 1341-1342 (Ala. Cr. App. 1982).

The Alabama Supreme Court affirmed. It correctly stated the applicable principles as follows:

> In Witherspoon the Supreme Court held: "[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Id., at 522, 88 S.Ct. at 1777. This position was reaffirmed in Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1972). Consequently, no veniremen may be removed for cause unless it is determined that his views as to capital punishment are so strong that he "would automatically refuse to impose a death sentence regardless of the evidence produced." Liddell v. State, 287 Ala. 299, 251 So.2d 601, 610 (1971).

Ex parte Dobard, 435 So.2d 1351, 1355 (Ala. 1983). After applying those principles to the facts, the Alabama Supreme Court concluded:

> The court finds it difficult to envision how either prospective juror could have been more explicit in expressing an unqualified opposition to the death penalty. Accordingly, under Witherspoon and Liddell, prospective jurors Cannon and McCasson were properly removed for cause.

Id., at 1356. That decision was correct.

Juror Cannon did make it "unmistakably clear" that she would "automatically" vote against the imposition of capital punishment regardless of the evidence. In Darden v. Wainwright, 669 F. 2d 1031, 1038 (11th Cir. 1983), vacated pending en banc consideration, No. 81-5590 (11th Cir. Sept. 1, 1983), the federal appeals court upheld the removal of a prospective juror who stated "I believe I would" be unwilling to return a death sentence verdict. The facts in this case are even stronger for removal. Juror Cannon stated that "I don't believe I would" and "I don't think I would" be able to vote guilty in this case regardless of the proof, and explained "I just don't believe I could send anyone to the electric chair." See p. 7 of this brief, above.

True, juror Cannon's answer was not a simple "no." However, considering the context in which her answer was given, it evidenced as little ambiguity as a one syllable answer would have. As the Eleventh Circuit panel in Darden explained:

> scrutiny of the cold record must not, however, treat the words of prospective jurors as free floating icebergs unrelated to the voir dire examination as a whole. The standards of veniremen...like all statements, must be examined and interpreted in the context in which they occurred.

699 F.2d at 1038. Prospective juror Cannon's statement that, "I just don't believe I could ever send anyone to the electric chair," was an explanation of why she would automatically vote against capital punishment in every case. It was not an equivocation.

More fundamentally, even if the state appellate courts ruled incorrectly on this issue — and they did not — the petition should be denied. This Court certainly does not need to be reminded of its incredible caseload, nor of the fact that it is simply impossible for this Court to review every decision of a lower court which it might perceive to be incorrect. Even petitioner's own assertions prove that such

review is unnecessary. If, as he says, the result in this case is contrary to the result which Eleventh Circuit precedent dictates, see Pet. at 17-18, then the error he perceives will be remedied in a 28 U.S.C. §2254 proceeding. Under Barefoot v. Estelle, 103 S. Ct. 3383 (1983), petitioner will be granted a further stay of execution pending consideration of his claim in the collateral proceeding which will be filed in federal district court as soon as certiorari is denied by this Court.

Moreover, petitioner's argument about why this case is certiorari worthy is illogical. He asserts that four times in the past fifteen years this Court has addressed his concerns and that "the message has been unmistakably clear," Pet. at 13, constituting "an unwavering mandate from this Court," Pet. at 14. Yet, he asks the Court to go at it again, to clarify what he says is already "unmistakably clear." This Court does not have sufficient resources to repeat what petitioner claims it has said four times already.

If there has been a difficulty in applying this Court's rulings in this area, that difficulty stems from the nature of the personal feelings being inquired about and the nature of the English language. All petitioner can suggest is formula questions and talismanic responses. They belong to the realm of religious liturgy, not to the law. The problems surrounding application of Witherspoon are not problems which will profit from a further journey by this Court over already much explored terrain. Four "unwavering mandate(s)" from this Court are enough.

III. THE SEQUESTRATION AND ASSASSINATION NEWS STORY ISSUE IS NOT AN APPROPRIATE ONE FOR CERTIORARI

On pp. 21 - 28 of the petition, petitioner contends that this Court should grant certiorari to review certain issues arising out of the fact that members of the jury viewed news

accounts of the attempted assassination of President Reagan. The Alabama Court of Criminal Appeals addressed the issues petitioner raised in that court concerning this matter as follows:

> Appellant contends that the jury's exposure to the media coverage of the assassination attempt on the life of the President of the United States, which attempt occurred during the trial of the case, was prejudicial to appellant's due process and equal protection guarantees and his right to a fair trial. Appellant urges that the trial court erred to a reversal in denying the motion for a new trial on this ground.
>
> The issue, of course, is not whether the exposure to the media coverage improperly influenced any member of the jury, but whether it might have unduly affected any juror to act outside the evidence in arriving at a verdict. Seekers v. State, 35 Ala.App. 40, 44 So.2d 628 (1949).
>
> The guilt phase of the trial was begun on March 30, 1981, and was concluded March 31, 1981. The sentencing phase was held on the succeeding day, April 1, 1981. The presidential assassination attempt occurred on March 30, 1981, the first day of the trial.
>
> At the conclusion of the sentencing phase and after the jury had returned its verdict, appellant requested a polling of the jury to determine whether the jurors had been permitted to watch television coverage of the assassination attempt or to read newspaper articles about it. The trial court denied the jury polling request but stated for the record that the jurors had seen the television reports.
>
> Appellant relies heavily on Seekers, supra, in furtherance of his position. Seekers is readily distinguished from this case. In Seekers, the jury, during an overnight recess, attended a rather gory movie; there were a number of coincidental similarities between the plot of that movie and the evidence presented in the case the jury was then hearing. One of the affidavits in the motion for a new trial in Seekers alluded to the similarities as follows:
>
> > "...The portrayals of death and suffering in the picture were such that it would have been most difficult for the jurors not to associate the scenes in the show with the testimony in the case. The two trials in which

> the defendants were convicted in the show were quite vividly portrayed and the verdicts rendered against the defendants could hardly have failed to impress the minds of the jurors to the prejudice of the defendant."
>
> In the case at bar, there are no indications of any similarities between matters in the news reports and any of the evidence being considered by the jury.
>
> The news reports obviously contained no communication, information, opinion, or other discussion of any facet of appellant's trial which would tend to affect the ultimate decision in the instant case.
>
> We cannot say that the jury's viewing television news reports of the attempted assassination of the President might have unduly influenced any member of the jury to act outside the scope of the evidence presented in this trial. Consequently, we find no error in the trial court's ruling in that regard.

Dobard v. State, 435 So.2d 1338, 1340-1341 (Ala. Cr. App. 1982).

The Alabama Supreme Court's treatment of the matter was as follows:

> The first issue posed by the petitioner is whether the media coverage surrounding the attempted assassination of President Reagan improperly influenced the jury and thereby denied petitioner the right to a fair trial as guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States.
>
> During the last two days of sequestration, all the members of the jury were allowed to, and did view on television, news accounts of the assassination attempt on President Reagan. The petitioner contends this exposure unlawfully influenced the jury by encouraging them to convict the petitioner. While it is not delineated in the record precisely which news accounts the jury actually viewed, the petitioner claims the news accounts were riddled with editorialization. The subliminal message allegedly transmitted to viewers was that something was wrong with America and Americans must take action. The available course of action for the jury, argues the petitioner, was to convict the petitioner of a capital crime. In support of this argument the petitioner relies principally upon the doctrine of Seekers v. State, 35 Ala.App 40, 44 So.2d 628, cert. denied, 253 Ala. 420, 44 So.2d 633 (1949).

In Seekers the jury was taken to a movie which bore striking similarities to the case being tried. The crime charged, and that portrayed in the movie, were both of a violent nature. The location of the victim's wounds in both instances was the same. Earlier that day, the jury had heard medical testimony concerning the wounds. Lastly, the film presented detailed accounts of the trial and convictions of the villains. Considering the similarities between the film and the trial, the court noted: "We would be compelled to enter into the realm of speculation, conjecture and surmise to hold that by witnessing the performance the jury was not unduly influenced against the interests of the accused." Seekers, supra.

Seekers and the case at bar, however, are distinguishable. Other than the violent nature of the crimes involved, the assassination attempt and petitioner's case bear few if any similarities. This court does not find that the news accounts complained of influenced the jury in the present case. Similarly, this court does not find that television coverage of the event influenced the jury through editorialization to the extent shown by Styles v. State, 129 Ga.425, 59 S.E. 249 (1907), as petitioner contends.

In Styles, the jury, while sitting for a murder case, was permitted to read an editorial criticizing jurors for their reluctance to convict murderers. The obvious impact and influence such an editorial could promulgate is not present here. Whatever "editorial message" the jurors in this case could have gleaned from the news accounts of the attempts on President Reagan's life was certainly unrelated and detached from their deliberations about this case. To hold otherwise would be to delve into boundless speculation.

"The test of vitiating influence is not that it did influence a member of the jury to act without evidence, but that it might have unlawfully influenced that juror and others with whom he deliberated, and might have unlawfully influenced its verdict rendered." Roan v. State, 225 Ala. 428, 435, 143 So. 454, 460 (1932). We hold the exposure to television coverage of the assassination attempt on President Reagan did not influence the jurors to the extent that they would have acted without evidence. Accordingly, the trial judge properly denied petitioner's motion for a new trial based on these grounds.

Ex parte Dobard, 435 So.2d 1351, 1354 (Ala. 1983).

Recognizing that "Alabama law applies an even stricter test than federal law" in this area, Pet. at 24, much of petitioner's argument to this Court is that the Alabama Supreme Court misapplied state precedents, Pet. at 21, 24; violated principles of "state due process," Pet. at 24; and engaged in an analysis "forbidden by Alabama law," Pet. at 25. Those contentions do not constitute federal questions, and this Court has no jurisdiction to review them. E.g., N.A.A.C.P. v. Claiborne Hardward Co., 102 S. Ct. 3409, 3422 (1982); Fuller v. Oregon, 417 U.S. 40, 42 n. 2 (1974); Mullaney v. Wilbur, 421 U.S. 684, 690-691 (1975); see, Rule 17.

Petitioner's contention that the trial court violated principles of federal due process by failing to poll the jury about whether exposure to news media accounts of the attempted assassination prejudiced them does present a federal question. However, that federal question was not presented to or decided by the state appellate courts below. Instead, petitioner only raised the issue of whether jury exposure to the news media accounts, as reflected in the record, violated due process. See pp. 11 - 13 of this brief, above; see also, Street v. New York, 394 U.S. 576, 582 (1969) ("when...the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."). The question of whether exposure to news media accounts violated due process is different from the question of whether failure to poll the jury to determine the effect of that exposure violated due process. See, Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974); cf., Warden v. Harless, 103 S. Ct. 276, 277 (1982) (per curiam) ("It is not enough that all the facts necessary to support the federal claim were before the state courts...or that a

somewhat similar state law claim was made.") (exhaustion of state remedies issue).

Because the federal question involving the necessity of polling the jury was not presented to or decided by the state appellate courts below, this Court need not decide it, Moore v. Illinois, 408 U.S. 786, 799 (1972), should not decide it, Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974), and has no jurisdiction to decide it, Street v. New York, 394 U.S. 576, 581-582 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945); see, 28 U.S.C. §1257(2) and (3); Rule 17.

CONCLUSION

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Edward E. Carnes, a member of the Bar of the Supreme Court of the United States, do hereby certify that I did serve a copy of tis brief on petitioner by placing a copy in the United States mail, postage prepaid, and properly addressed to his counsel of record as follows:

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I further certify that I have served all parties required to be served.

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